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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. McCREE, Jr.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
PETER BUSCEMI,
Assistant to the Solicitor General,
WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals on remand (App. A, *infra*, pp. 1A–35A) is reported at 564 F. 2d

1219. The initial opinion of the court of appeals (App. D, *infra*, pp. 40A–84A) is not reported. The opinion of the district court in *Elliott* (App. F, *infra*, pp. 89A–118A) is reported at 371 F. Supp. 960. The district court in *Buffington* did not write an opinion.

JURISDICTION

The judgments of the court of appeals (App. C, *infra*, pp. 38A–39A) were entered on July 1, 1977. A petition for rehearing was denied on December 15, 1977 (App. B, *infra*, pp. 36A–37A). On March 7, 1978, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 14, 1978. On April 5, 1978, Mr. Justice Rehnquist further extended the time to and including April 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that an oral hearing be held before, rather than after, a Social Security beneficiary's payments are reduced in order to recoup an erroneous overpayment.

2. Whether a nationwide class action, on behalf of persons who have not met the jurisdictional requirements of Section 205(g) of the Social Security Act, may be maintained to challenge the procedures used to process social security cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

2. Section 204 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 404, and the regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part in App. G, *infra*, pp. 119A–156A.

STATEMENT

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education, and Welfare] * * * [by] decreas-[ing] any payment under this subchapter [relating to old-age, survivors', and disability insurance] to which such overpaid person is entitled." Section 204 (b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." This case concerns the constitutional validity, under the Due Process Clause, of the procedures used by the Secretary in implementing these provisions.

Under the Secretary's procedures, once the Secretary has initially determined that an overpayment has been made, the recipient is notified of the determination and given an opportunity to contest the determination in writing and, in addition or in the alternative,

to request that the Secretary waive recovery in accordance with Section 204(b) of the Act. He is invited to discuss his case with the local Social Security office. See 20 C.F.R. 404.907–404.913 (App. G, *infra,* pp. 150A–153A). With one minor exception, adjustment or recovery is deferred pending review of the initial determination (App. G, *infra,* pp. 126A, 134A, 139A).[1] If the Secretary decides on review that the initial determination of an overpayment was correct and that waiver of recovery is not warranted, the beneficiary's subsequent monthly benefit payments are reduced until the overpayment has been recouped, as provided by Section 204(a)(1) of the Act (App. G, *infra,* pp. 155A–156A).

Following the Secretary's decision on this initial review, the beneficiary is entitled to further administrative review, including a full evidentiary hearing. 20 C.F.R. 404.917 (App. G, *infra,* pp. 154A–155A). If, following the hearing, the Secretary determines that there has been no overpayment, or that the beneficiary is entitled to waiver of recovery, the beneficiary's withheld payments are repaid and his subsequent payments restored to the appropriate level.

[1] The Social Security Claims Manual § 5503.1 provides in pertinent part (App. G, *infra*, p. 127A):

"The only exception to this rule is when the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. Under such circumstances the surviving beneficiary is given notice at the time of superendorsement of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right.

"In the above situation, an immediate adjustment action is taken."

2. Suits challenging this procedure were filed in the United States District Court for the Western District of Washington (*Buffington*) and the United States District Court for the District of Hawaii (*Elliott*). The cases present the same issues and were consolidated by the court of appeals.

a. The named respondents in *Buffington,* Mrs. Buffington and Mrs. Biner, are recipients of Social Security retirement benefits. The Secretary determined that respondents had received an overpayment and sought to recoup it. The determination was made on the basis of annual reports of excess earnings filed by respondents. 42 U.S.C. 403(h) requires a beneficiary to file such reports when his earnings exceed the statutory maximum (see 42 U.S.C. 403(f)).

The amount of Mrs. Buffington's overpayment was $78.60. She was notified of the overpayment on October 3, 1973, and the $78.60 was withheld from her November 1973 check.[2] She then requested reconsideration by the Secretary, who sustained the determination that there had been an overpayment (App. A, *infra,* p. 8A). On October 22, 1974, the district court ordered the Secretary to restore to respondent the amount recouped from her until she was given the opportunity for a hearing (App. D, *infra,* p. 42A).

[2] Under the Social Security Claims Manual provisions effective in October 1973, administrative reconsideration occurred only after the beginning of recoupment, where the Secretary's original overpayment determination was based on an annual earnings report filed by the beneficiary himself.

The amount of respondent Biner's overpayment was $2,216.20, representing the total amount of benefits she had received during 1972. After the Secretary's initial determination of an overpayment, Mrs. Biner twice requested reconsideration of the finding that there had been an overpayment; she also requested that recoupment of the overpayment be waived. After considering Mrs. Biner's submissions, the Secretary adhered to his decision that recovery of the overpayment was appropriate (App. D, *infra*, pp. 50A–51A).[3] After the institution of this suit, Mrs. Biner received an oral hearing before an administrative law judge, who sustained the Secretary's decision (App. D, *infra*, p. 51A).

On December 11, 1973, respondents Buffington and Biner brought this suit as a class action, contending that the Secretary's procedures for recovering overpayments fail to provide due process of law because they do not afford claimants a pre-recoupment oral hearing. The district court determined that it had

[3] In denying Mrs. Biner's request for waiver, the Secretary found Mrs. Biner at fault in retaining the benefit checks. Mrs. Biner had worked throughout 1972 and had earned more than $7,000 for the year—a sum that precluded eligibility for any benefit payments. Mrs. Biner did not, however, file a report of excess earnings for that year. The Secretary subsequently learned from Mrs. Biner's employer that she had excess earnings and requested that she file an earnings report. When she did so, the overpayment was determined. On the basis of these facts, the Secretary concluded that Mrs. Biner was not without fault in receiving the overpayment and therefore refused to waive recoupment (Affidavit of Forbus, Deputy Director, Bureau of Retirement and Survivors' Insurance, Social Security Administration; App. A, *infra*, pp. 8A–10A).

jurisdiction under 28 U.S.C. 1361 and certified the case as a nationwide class action, defining the class as all persons eligible for old age and survivors' benefits whose benefits have been or will be reduced or otherwise adjusted without notice and opportunity for a prior hearing (App. D, *infra*, p. 54A; district court order of April 4, 1974).[4] The district court declared the Secretary's recoupment procedure unconstitutional and enjoined the Secretary from recovering any overpayment from members of the class without affording them an opportunity for a pre-recoupment hearing (App. D, *infra*, p. 42A).

b. The findings of overpayments to Mr. Silva, Mr. Vaquilar, and Mrs. Ortiz—three of the named respondents in *Elliott*—also were based on their own reports of excess earnings (App. F, *infra*, pp. 93A–94A). The overpayments to the other named respondents had been mistakenly made for other reasons: Mrs. Elliott received both retirement and disability benefits when she was entitled to only disability payments; Mr. Gaines received duplicate checks for the same benefit period; Mrs. Yamasaki was overpaid because of a processing error (App. F, *infra*, pp. 96A–98A). All of the respondents sought reconsideration and waiver from the Secretary but initiated this suit before the Secretary could act on their requests. All monies recovered from respondents have been restored to

[4] The class order was later modified to exclude groups of beneficiaries whose claim to a prior hearing was already the subject of litigation in other courts (App. D, *infra*, p. 54A; district court order of October 29, 1974). See note 8 *infra*.

them by order of the district court (App. F, *infra*, p. 117A).

The *Elliott* respondents challenged the constitutionality of the Secretary's recoupment procedures on the same basis as the *Buffington* respondents. The district court in *Elliott* declared the recoupment procedure unconstitutional and enjoined the Secretary from recovering overpayments from Social Security old age, survivors', and disability beneficiaries residing in Hawaii, without first according those beneficiaries an opportunity for an oral hearing (App. F, *infra*, pp. 93A, 112A, 117A).

c. The court of appeals affirmed the holdings of the district courts with regard to jurisdiction and the propriety of class relief. The court further affirmed the holdings that the Secretary's recoupment procedures are unconstitutional, but it remanded the cases to the district courts for the entry of more limited orders that would require a prior oral hearing only where the Secretary's determination might turn on the credibility of witnesses.[5]

[5] For purposes of convenience, the court distinguished two categories of overpayment disputes, "reconsideration" cases and "waiver" cases. "Reconsideration" cases generally involve the correctness of the Secretary's determination that an overpayment has occurred (*e.g.*, whether the computation of an earnings statement is correct, or whether two benefit checks have been received rather than one) and ordinarily can be decided on the basis of documentary evidence. But in "waiver" cases, the court concluded, issues of credibility often are involved in determining whether a claimant was at fault in receiving an overpayment. The court determined, however, that the constitutional necessity of a prior hearing turns on the particular facts of each case and not on whether the case is one of "reconsideration" or "waiver" (App. D, *infra*, pp. 75A–82A; see also App. A, *infra*, pp. 23A–30A).

3. After the initial decision of the court of appeals, this Court held in *Mathews* v. *Eldridge*, 424 U.S. 319, that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability benefits. The Secretary then filed a petition for a writ of certiorari in these cases (No. 75–1234), challenging the decision of the court of appeals as inconsistent with the principles established in *Eldridge*. This Court granted the petition, vacated the judgments, and remanded for further consideration in light of *Eldridge* (425 U.S. 987).[6] On remand, the court of appeals adhered to the essential features of its earlier conclusion (App. A, *infra*, pp. 1A–35A).

The court distinguished *Eldridge* on two grounds. First, the court declared that, unlike the medical disability inquiry in *Eldridge*, waiver determinations (particularly those involving recipients' fault in inducing or retaining overpayments) frequently turn on issues of credibility, and thereby entail a greater risk of erroneous deprivations if an evidentiary hearing is not provided (App. A, *infra*, pp. 24A–30A). Second, the court thought that the administrative burdens associated with requiring an oral hearing prior to

[6] The Court also granted certiorari and vacated the judgment in *Mathews* v. *Mattern*, No. 75–649, a petition to review a case from the Third Circuit raising identical issues. The court of appeals then remanded *Mattern* to the district court, and on March 7, 1977, that court held that *Eldridge* is not materially distinguishable from the situation presented here. Accordingly, the district court granted summary judgment for the Secretary, 427 F. Supp. 1318 (E.D. Pa.). The case is pending on appeal in the Third Circuit, No. 77–1629.

recoupment are substantially less onerous than the corresponding burdens that would be imposed by a similar procedural requirement as a precondition to termination of disability benefits. The court predicted that Social Security beneficiaries would request pre-recoupment evidentiary hearings in only a small percentage of overpayment cases, and it stated that, in contrast to the termination situation, benefits paid during the course of additional pre-recoupment review would almost always go to persons entitled to receive them (App. A, *infra,* pp. 30A–33A).[7]

With respect to the jurisdictional issues raised by the Secretary, the court of appeals also adhered to its previous ruling. The court upheld the district courts' exercise of mandamus jurisdiction under 28 U.S.C. 1361 to grant injunctive and class relief that the court of appeals recognized might not be available under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g) (App. A, *infra,* p. 10A n. 10).

[7] The court held that requests to reconsider the finding that there had been an overpayment generally would not require a prior oral hearing and that requests to waive recoupment generally would require a prior oral hearing (App. A, *infra.* pp. 23A–30A, 33A–34A). The court stated however, that the requirement of a hearing would turn on the facts of each case.

This Court recently has discussed the consequences of a rule under which the agency cannot know, until the case is over and a court has spoken, what procedures it should have used. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76–419, decided April 3, 1978, slip op. 24–26. This case illustrates the agency's response to an uncertain procedural rule. Since the date of the court of appeals' first opinion in this case, the Secretary has endeavored to offer a prior oral hearing in all recoupment cases involving class members.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in these cases represents an improper and unwarranted extension of the rule of *Goldberg* v. *Kelly,* 397 U.S. 254, to the Social Security program. If not reversed, the decision will impose on the administration of that program a substantial and costly burden wholly disproportionate to the limited private interest that would be served. Moreover, because the district court in *Buffington* certified a nationwide class action, the decision here has far-flung consequences. There cannot be any further consideration of this problem by the lower courts, and a meaningful conflict among the circuits cannot arise.[8] If the Court does not grant review here, the decision of the court of appeals will become conclusive.

In response to the Secretary's previous petition in this case, this Court vacated the judgment of the court of appeals and remanded for reconsideration in light of *Mathews* v. *Eldridge,* 424 U.S. 319. The court of appeals' adherence, on remand, to its earlier ruling is inconsistent with the analysis of *Eldridge.*

1. The Secretary's procedures governing the recovery of Social Security overpayments provide a fair and reliable basis for determining whether an overpayment has been made and, if so, whether re-

[8] The nationwide class excepts only cases now in litigation in other courts. See page 7 and note 4, *supra.* The case now pending in the Third Circuit (*Mathews* v. *Mattern, supra*), therefore would govern only a few decisions and would have limited prospective effect.

covery should be waived. The additional administrative and social costs associated with prerecoupment evidentiary hearings significantly outweigh any social benefits that accrue from such a requirement. This Court recognized as much in *Eldridge,* when it held that an evidentiary hearing need not be held before termination of Social Security disability benefits. 424 U.S. at 349.

The Secretary initially makes a determination that an overpayment has been made. The beneficiary is notified by mail of the determination and is advised of his right to request reconsideration or waiver. If the beneficiary responds within 30 days, the Secretary defers recoupment until he has acted on the request.[9] In seeking reconsideration or waiver, the beneficiary may consult personally with officials at the Social Security district office, which is usually located near his home. The beneficiary may supply whatever documentation he wishes in support of his position, and printed forms are made available to facilitate the presentation of the beneficiary's case.

Only after the Secretary has fully evaluated the beneficiary's case, and has adhered to his initial determination that recoupment is appropriate, does the process of recovering the overpayment begin. As soon

[9] Any objection at all within the 30-day period is sufficient to postpone recoupment. Even if the beneficiary does not make a request for reconsideration or waiver within that period, a reconsideration request made within sixty days, or a waiver request, whenever made, will result in a resumption of full benefits until the request has been acted on (App. G, *infra*, pp. 126A, 139A).

as the beneficiary is advised of the Secretary's determination, he may request a full evidentiary hearing with respect to his claim.

The beneficiary thus knows the basis for the Secretary's proposed action and may present objections to that action before it is taken. Although these objections must be submitted in writing, the beneficiary can discuss his case with local Social Security officials, who are responsible for assisting him in providing all the information necessary to evaluate his case. Finally, any beneficiary who is still dissatisfied with the Secretary's decision after initial review has the right to a full evidentiary hearing after recoupment has started. If the Secretary's decision is reversed after that hearing, the beneficiary receives full restitution of any benefits previously withheld.

These procedures adequately protect the beneficiary's interest in avoiding improper reduction of payments. The beneficiary can appear personally before and consult with the local Social Security officials who are responsible for developing the facts concerning his claim (App. G, *infra,* pp. 125A–126A, 127A–131A). He thus has an opportunity for a pre-recoupment meeting with officials who may assess his credibility in the course of gathering the facts necessary for regional office review. Moreover, in situations where the beneficiary requests waiver rather than reconsideration, he by definition acknowledges that he is not entitled to the payments he received. In such circumstances, the Constitution does not bar

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the Secretary from proceeding to collection, subject to a possible return of the monies if the beneficiary's equitable contentions are sustained after a subsequent oral hearing. See, *e.g., Dixon* v. *Love,* 431 U.S. 105, 112–116. Cf. *Arnett* v. *Kennedy,* 416 U.S. 134, 150–158; *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600.

The Secretary's recoupment procedures are a constitutionally permissible accommodation of the factors that must be considered in determining what procedures the Due Process Clause requires in a given situation. The Court in *Eldridge* identified three such factors (424 U.S. at 335):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Having evaluated these factors, the *Eldridge* Court declined "to depart from the ordinary principle * * * that something less than an evidentiary hearing is sufficient prior to adverse administrative action" (*id.* at 343).[10] No such departure is justified in this case.

[10] The Court noted that only in *Goldberg* v. *Kelly, supra,* had it held that "due process requires an evidentiary hearing prior to a temporary deprivation" (424 U.S. at 340). The outcome in *Goldberg* turned on the welfare context of that case. In the Court's words, "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits" (397 U.S. at 264). By contrast, here, as in *Eldridge*, the benefits at issue are not distributed on the basis of the need of the recipients. Eligibility for Social Security retirement benefits, like eligibility for Social Security disability benefits, is unrelated to the recipients' "income or support from many other sources" (424 U.S. at 340–341).

See also *Dixon* v. *Love, supra* (no prior hearing needed for suspension of driver's license); *Smith* v. *Organization of Foster Families,* 431 U.S. 816 (an informal conference with state personnel is sufficient process before removal of a foster child from a foster home).

(*a*) The private interest in the uninterrupted receipt of benefits pending final administrative action is less substantial here than in *Eldridge.* That case involved termination of all disability benefits; this case involves only a temporary reduction in otherwise continuing benefits in order to recover overpayments. Not only will full benefits resume once recoupment is complete, but, under prevailing regulations and Social Security Claims Manual provisions, beneficiaries may request that recovery be spread out to diminish the amount by which monthly payments are reduced. See 20 C.F.R. 404.502(c) (App. G, *infra,* pp. 146A–147A); Claims Manual §§ 5515, 5515.2, 5515.4 (App. G, *infra,* pp. 141A–145A). Such extensions of the recoupment period (called "partial adjustments") are routinely granted, unless the overpayment was the result of fraud or unless "the beneficiary has income and resources sufficient to meet current ordinary

expenses despite a loss of the full monthly benefits" (Claims Manual § 5515.2(a)).

The partial adjustment system ordinarily permits monthly payments to be maintained at a level that enables the recipient to meet current expenses.[11] In the absence of fraud, monthly benefits will not be reduced by more than 25 percent, unless the beneficiary's other resources permit larger withholdings.[12] Thus, unlike the termination of disability benefits in *Eldridge,* recoupment of Social Security overpayments usually does not require discontinuance of monthly payments.

Moreover, in the event that recovery of excess retirement or disability insurance benefits creates a situation of financial need, elderly or disabled recipients generally will be eligible for Supplemental Security Income (SSI) benefits under Title XVI of the Social Security Act, 42 U.S.C. (Supp. V) 1381 *et seq.* By contrast, because the definition of disability for Social Security and SSI purposes is the same

[11] If the partial adjustment necessary to allow the recipient to meet current expenses results in a withholding so small that full recovery of the overpayment is not possible within 36 months or before the end of the recipient's entitlement to benefits, the Secretary will withhold as much as 25 percent of monthly payments even though this may reduce benefits below the level necessary to meet current expenses. Claims Manual § 5515.4(d)(3) (App. G, *infra*, p. 145A).

[12] The sole exception to this general rule is the Claims Manual requirement that monthly withholdings be at least $10. This minimum monthly withholding presumably applies even if $10 is more than one-fourth of monthly benefits. Claims Manual § 5515.4 (d)(1) (App. G, *infra*, p. 144A). (Few monthly Social Security payments are less than $40.)

(compare 42 U.S.C. 423(d)(1)(A) and (d)(2)(A) with 42 U.S.C. (Supp. V) 1382c(a)(3)(A), (B)), a person whose disability insurance payments are terminated by virtue of a finding that his disability no longer exists, as in *Eldridge,* almost certainly would be ineligible for SSI disability benefits (424 U.S. at 342 n. 27). For this reason as well, therefore, the private interest in avoiding improper recoupment of overpayments is not as great as the private interest in avoiding incorrect termination of disability benefits.

(*b*) In weighing the risk of erroneous deprivations in the absence of additional or substitute procedures, the *Eldridge* Court focused on "the nature of the relevant inquiry" and the extent to which existing procedures "provide an effective means for the recipient to communicate his case to the decisionmaker" (424 U.S. at 343, 345). The Court observed that the medical assessments necessary for resolution of disability issues are particularly well suited to presentation in documentary form. In addition, the Court noted that the procedures employed were designed to inform recipients of the factors likely to be critical in the entitlement decision, to ensure recipients full access to information on which the decisionmaking agency relied in reaching its initial determination, and to afford recipients an opportunity to respond to that evidence identified by the decisionmaker as most significant (424 U.S. at 345–346). The Court concluded that, under these circumstances, the lack of an evidentiary hearing prior to termination of disability benefits did not create an intolerable risk of error.

By contrast, when the Court addressed the subject of welfare terminations in *Goldberg* v. *Kelly, supra,* it held that exclusive reliance on written submissions violated the Due Process Clause. Where the criterion for public assistance is "need," issues of witness credibility may be of central importance. Documentary evidence alone may be inadequate to describe fully the economic situation of a welfare family. The *Goldberg* Court also stressed that persons threatened with termination of welfare benefits frequently cannot write effectively (397 U.S. at 269). Moreover, the procedure under scrutiny in *Goldberg* provided no indication of the decisionmaker's prime factual concerns in individual cases and thus did not permit recipients to shape their arguments to meet those concerns (*ibid.*). The risk of error in this situation was too great to permit the resolution of disputes on written submissions alone.

Here, as the court of appeals found, when a Social Security beneficiary requests reconsideration of an overpayment determination, the relevant inquiry is likely to be one "well suited to resolution by documentary proof" (App. A, *infra,* p. 24A). And although, when an overpaid beneficiary requests waiver of recovery, the decisive issues are likely to be more diffuse, this does not indicate that written submissions produce unreliable decisions.[13] The Secretary's re-

[13] The Court has indicated, moreover, that the making of subjective judgments (such as whether recoupment would be "unfair") are not "readily adapted to the procedural tools of judicial and administrative decisionmaking." *Board of Curators* v. *Horowitz*, No. 76-695, decided March 1, 1978, slip op. 11.

coupment procedures are calculated to apprise beneficiaries of the facts deemed pertinent by the decisionmaker and to enable beneficiaries to respond meaningfully to unfavorable initial findings. Specific forms are provided for reconsideration and waiver requests, and beneficiaries are guaranteed access to the files containing information on the overpayments they allegedly received. See 20 C.F.R. 401.3(a). Beneficiaries may submit whatever documentation they wish in support of their claims and they may consult with the appropriate Social Security district office concerning the reasons for the Secretary's overpayment or waiver determinations. In short, the Secretary's recoupment procedures contain ample safeguards against mistake.

This conclusion is supported by experience. The district court's order in *Buffington* was not stayed pending appeal. Accordingly, after an initial period of preparation during which no overpayments were recovered, the Secretary began to offer pre-recoupment evidentiary hearings. The first such hearings were held in January 1977. Approximately 1.25 million Social Security beneficiaries are overpaid annually. In calendar year 1977, 42,880 persons (3.4 percent of this group) requested waiver of recoupment. After initial or reconsidered waiver determinations made on the basis of written submissions, approximately 19,400 requests (45.3 percent) were granted.[14]

[14] The high rate of waiver grants after initial request or reconsideration belies the court of appeals' assertion that "most of the factors involved in a waiver determination are not capable of

Of the approximately 23,480 recipients whose waiver requests were denied, 1,282 (5.46 percent) sought a personal conference. Results of these hearings are not yet available. However, of 1,250 personal conferences held under the *Buffington* injunction (most of them requested in the period before 1977), 366 (29 percent) resulted in reversal of previous waiver denials. If the same rate of reversal persists, the personal conferences requested in 1977 will produce approximately 375 grants of waiver. Thus, of the 1.25 million persons whom the Secretary initially concludes have been overpaid each year, approximately 375 (1.6 percent of those who were denied waiver following written proceedings of the sort the Secretary supplied before the *Buffington* injunction, and 0.03 percent of those whose payments are recouped) would obtain a different result under a pre-recoupment oral hearing procedure. Perhaps the most noteworthy statistics are the low percentage of those overpaid who seek waiver and the low percentage of those denied waiver who seek an oral hearing. The error rate certainly compares favorably with that discussed by this Court in *Eldridge* (424 U.S. at 346–347 and n. 29).

(iii) The last of the three factors listed in *Eldridge* is "the public interest," particularly "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to" a deprivation of benefits (424 U.S. at 347). Admitting the difficulty of predicting the magnitude of such increased costs, the Court declared that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial" (*ibid.*).

The evidentiary hearings ordered by the court of appeals have imposed significant new costs on the administration of the Social Security program. The Secretary estimates that the direct cost of conducting 1,200 oral hearings annually is $100,000. This does not include losses incurred because of inability to recover overpayments after a prolonged pre-recoupment period (during which the recipient may have died or become ineligible for some other reason). It also does not include the loss of interest on overpaid funds whose recovery is delayed due to the hearing requirements. The expense of establishing and maintaining a personal conference system with trained staff is another cost that must be added. And, perhaps, most importantly, the Secretary's estimate does not include the costs of delay introduced elsewhere in the administrative process, as scarce resources are devoted to hearings in recoupment cases. The delay hurts both applicants for new benefits and existing beneficiaries when the unavailability of staff prevents the processing of new claims and post-entitlement actions.

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resolution by written submissions" (App. A, *infra*, p. 30a). This Court has said that a similar reversal rate in the context of the Social Security disability program "attests to the fairness of the system and refutes the implication of impropriety." *Richardson* v. *Perales*, 402 U.S. 389, 410.

Moreover, there is a significant possibility that the number of oral hearings will increase as Social Security recipients themselves increase in number and become more familiar with the available procedures. That possibility could extend beyond recoupment cases. To the extent this case represents the court of appeals' judgment that other beneficiaries also are entitled to pre-action hearings, Social Security recipients facing termination or suspension of benefits may well claim entitlement to an evidentiary hearing before adverse administrative action, on the ground that *Eldridge* is limited to medical disability cases. If the scope of *Eldridge* were so restricted, a substantial increase in the number of pre-deprivation hearings could be expected.

2. The court of appeals held (App. A, *infra,* pp. 10A–15A) that the district courts had jurisdiction of these cases under 28 U.S.C. 1361, the mandamus statute, and that Section 1361 authorized the grant of class-wide relief to all persons who might be affected by the Secretary's practices. In so doing, the court exceeded the jurisdiction that has been granted by Congress.

Weinberger v. *Salfi,* 422 U.S. 749, 757, held that the district courts do not have jurisdiction to adjudicate claims, such as respondents', arising under Title II of the Social Security Act, "save as provided [by Section 205(g) of] the Act," 42 U.S.C. 405(g). It therefore held that class relief was impermissible, because only the persons who satisfied the require-

ments of Section 205(g), including the filing of a claim with the Secretary, could receive judicial relief. In *Califano* v. *Sanders,* 430 U.S. 99, the Court reiterated that, unless review is available under Section 205(g), it is not available at all. The court of appeals therefore erred in holding that district courts may assume jurisdiction under 28 U.S.C. 1361. Other courts have recognized that to assume jurisdiction under Section 1361 as a catch-all is effectively to disregard the limitations on judicial review consciously designed by Congress. See, *e.g., Association of American Medical Colleges* v. *Califano,* 569 F. 2d 101 (C.A. D.C.) (collecting cases).

We do not argue here, however, that the district courts were without jurisdiction to adjudicate the claims of the named respondents. The Court held in *Eldridge* that the only mandatory jurisdictional requirement under Section 205(g) is the filing of a claim with the Secretary, and that, although exhaustion of administrative remedies ordinarily is a precondition to judicial review, exhaustion is unnecessary when there is a colorable constitutional claim entirely collateral to the merits of the statutory entitlement to benefits.[15] The named respondents here all filed claims seeking to avoid recoupment, and under the principles of *Eldridge,* the district courts could properly adjudicate their individual cases.

The courts were not entitled, however, to grant relief to other persons. The relief in these cases is

[15] See also *Mathews* v. *Diaz,* 426 U.S. 67, 74–77.

improper for three separate reasons. First, relief was granted to persons who were not before the court. Second, the class included persons who have not filed any claim with the Secretary and therefore have not met the jurisdictional requirement of Section 205(g). Third, the class in *Buffington* is nationwide.

The first of these problems is before the Court in *Califano* v. *Aznavorian,* No. 77–991, probable jurisdiction noted, March 20, 1978. If the Court agrees with our argument in *Aznavorian,* it should reverse the grants of class relief here.[16] If the Court decides *Aznavorian* without considering the class action issue, it may resolve that important question in these cases.

The second of the problems has been addressed by this Court before. *Weinberger* v. *Salfi, supra,* necessarily held that class relief is impermissible unless each member of the class satisfies the requirements of Section 205(g). Lower courts, however, continue to grant class relief if at least one member of the

[16] See also *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118, 123–124 (D. Md.), summarily affirmed *sub nom. Jablon* v. *Califano*, 430 U.S. 924. We discuss at pages 19–25 of our brief in *Norton* v. *Mathews*, 427 U.S. 524, the reasons why Section 205(g) does not authorize a court to grant injunctive relief. If our argument is correct (and the Court did not pass on that argument in *Norton*), it must follow that class-wide injunctions are unauthorized. In our view, Section 205(g) reveals a clear congressional intent to confine judicial relief to awards of money in particular cases. (We have furnished copies of our jurisdictional statement in *Aznavorian* and our brief in *Norton* to counsel for respondents.)

class satisfies the jurisdictional requirement. See, *e.g., Liberty Alliance of the Blind* v. *Califano,* 568 F. 2d 333 (C.A. 3); *Johnson* v. *Mathews,* 539 F. 2d 1111 (C.A. 8); *Jimenez* v. *Weinberger,* 523 F. 2d 689 (C.A. 7), certiorari denied, 427 U.S. 912. If a class action is permissible, the scope of the class is an important question that should be considered by this Court.

The third problem is before the Court in *Califano* v. *Mandley,* No. 76–1416, argued November 30, 1977 (with *Quern* v. *Mandley,* No. 76–1159). We have argued in *Mandley* that the certification of nationwide classes precludes the reasoned consideration of a difficult legal problem by more than one court. The first case to reach decision forecloses the opportunity for further debate. Moreover, the sweeping effect of a nationwide injunction may force this Court to undertake premature review of a problem without the benefit of the views of more than one lower court.[17] The arguments we have made in *Mandley* are applicable here as well.[18]

[17] See *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n. 26.

[18] We have furnished copies of our brief in *Mandley* to counsel for respondents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
PETER BUSCEMI,
Assistant to the Solicitor General.
WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys.

APRIL 1978.

APPENDIX A

EVELYN ELLIOTT AND BENITO MOLINA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARILY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND SUNG DAI SEU, INDIVIDUALLY AND IN HIS CAPACITY AS PACIFIC AREA MANAGER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS-APPELLANTS

FANNIE BUFFINGTON AND FRANCES BINER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT-APPELLANT

Nos. 74–1611, 74–3118
United States Court of Appeals, Ninth Circuit
July 1, 1977
Rehearing and Rehearing In Banc Denied
Dec. 15, 1977.

Before BROWNING and TRASK, *Circuit Judges,* and WILLIAMS,[1] *District Judge.*

[1] Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

SPENCER WILLIAMS, *District Judge*:

These consolidated appeals by the Secretary of the Department of Health, Education, and Welfare (hereinafter refered to as the "Secretary") challenge the judgments of two district courts requiring, *inter alia,* the Secretary to provide old-age and disabled social security beneficiaries the right to a hearing prior to the initiation of procedures to recoup monies paid to such beneficiaries allegedly in excess of their legal monthly entitlements. In both these class action suits plaintiffs-appellees assert that the procedures utilized by the Secretary in recouping excess payments denied them due process of law under the fifth amendment because their benefits were reduced or suspended without adequate notice of the reason for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment of the Secretary's recoupment decision, and without affording them the opportunity to have a pre-recoupment hearing. *Elliott* v. *Weinberger,* 371 F. Supp. 960, 964 (D. Haw. 1974); *Buffington* v. *Weinberger,* Civil No. 734–73C2 (W.D. Wash., Oct. 22, 1974). The district courts held that mandamus jurisdiction was established under 28 U.S.C. § 1361,[2] and that the recoupment procedures violated the due process rights of the com-

[2] In *Elliott* v. *Weinberger*, plaintiffs asserted that jurisdiction additionally existed under 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* The court in *Elliott*, however, expressly declined to decide whether jurisdiction could be properly predicated upon these sections, but noted in passing that support existed for either jurisdictional base. In *Buffington* v. *Weinberger*, the court found both § 1361 and § 701 *et seq.* to furnish the necessary jurisdictional basis. The Supreme Court recently held in *Califano* v. *Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977) that § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701–706 does not provide an independent basis for jurisdiction.

plaining recipients. In addition, the courts ordered that prior to recoupment the Secretary must give the recipients adequate notice of their right to request and be afforded a hearing. We are in substantial agreement with the rulings of the courts below that a prior oral hearing ought to be afforded recipients prior to recoupment of their monthly benefits when they claim a waiver. However, we do not believe that such a hearing is constitutionally compelled in straight reconsideration cases, in light of *Mathews* v. *Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), unless the issues raised in a recipient's request for reconsideration of the Secretary's initial overpayment and recoupment determination are incapable of resolution upon written submission and/or documentary proof.

THE STATUTORY AND PROCEDURAL BACKGROUND

The Social Security Act vests the Secretary with the power to recover lost funds in the event overpayments are made to recipients of old-age or disability benefits. 42 U.S.C. § 404 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to

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his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. * * *

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The challenged government procedures are as follows: As of January 1, 1974,[3] all recipients subject to recoupment receive form letters which set forth the reasons for the proposed recoupment, the availability of reconsideration (when a recipient asks for reconsideration, the correctness of the overpayment determination itself is being challenged), the condition for waiver (when a beneficiary requests that his overpayment be waived, he is, in effect, conceding the debt but asking that it be forgiven or reduced[4]), and the

[3] At the time these suits were filed, those beneficiaries whose overpayments were determined from their "annual earnings reports" were not entitled to advance notice of recoupment. Rather, recoupment began immediately, subject to later consideration of the beneficiary's request for reconsideration or waiver. Plaintiffs Silva, Ortiz, Vaquilar, Biner and Buffington all had recoupment procedures initiated against them on the basis of earnings reports filed with the Secretary. Following January 1, 1974 it has been the Secretary's practice to provide all such beneficiaries the same pre-recoupment notices as in other overpayment cases.

[4] It should be logically possible to request both reconsideration and waiver in the alternative. A claimant could dispute that overpayment occurred and claim further that even if an overpayment did occur, he was not at fault.

need to consult the local Administration office within thirty days if they wish to complain.[5]

The initial overpayment and recoupment notice sent to beneficiaries makes no mention of the forms needed for reconsideration or waiver, nor sets forth information about how to complete them. However, the beneficiary may obtain review of his case by sending a letter stating his reasons for opposing the overpayment determination or seeking a waiver.

It is the Secretary's policy to immediately defer recoupment action upon receipt of a request for reconsideration or waiver. Claims Manual § 5503.5. Deferral of recoupment beyond thirty days after the date of initial notice, however, lies completely within the discretion of the Administration.

If, after review of the information supplied by the beneficiary, the Secretary adheres to his initial determination that recoupment is appropriate, he notifies the beneficiary to this effect and resumes the withholding of benefits to satisfy the overpayment. If dissatisfied with this decision, the beneficiary may request an administrative hearing *de novo,* in which the beneficiary is provided an opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. 20 C.F.R. § 404.928–.929. However, recoupment is not suspended pending

[5] Social Security Claims Manual § 5503(a) requires the Secretary to inform overpaid beneficiaries of their "right to request reconsideration" and of the applicable waiver provisions of the Social Security Act. Contrary to the Secretary's contention, the form letter notice does not apprise a beneficiary of his "right" to waiver consideration. Nor does the Claims Manual require such disclosure. Only the "provisions" of waiver need be revealed. Even as to reconsideration, the form letter fails to make clear that such re-appraisal is a matter of right rather than a mere possibility.

the outcome of this *de novo* hearing. The beneficiary is further entitled to appeal the hearing examiner's determination to the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945), and to judicial review of the Appeals Council's decision pursuant to 42 U.S.C. § 405(g).

THE FACTS

In *Elliott,* plaintiffs Silva, Ortiz and Vaquilar (subclass one) were determined to have been overpaid by the Secretary based upon their own annual earnings reports. They all received the form letter indicating the reasons for the overpayment determination, the specific amount overpaid and the amount by which the recipient's subsequent benefit checks would be reduced or suspended altogether. These plaintiffs were additionally apprised of the possibility of reconsideration and the conditions of waiver. All of them contacted the Administration's local offices within thirty days of receipt of the letter. At the time the *Elliott* court rendered its decision, the Secretary had completed recoupment against two of these plaintiffs, but as to the other had deferred recoupment pending disposition of the suit.

Plaintiffs Elliott, Gaines and Yamasaki (subclass two) received notices more than thirty days before recoupment was to begin, which disclosed information similar to that contained in the notices sent to subclass one plaintiffs.[6] Plaintiff Elliott was notified that the overpayment determination was predicated upon "her receipt of both retirement and disability benefits when she was entitled to only disability benefits." *Elliott, supra* at 965. " Duplicate payments"

[6] For a discussion of the major difference see note 2 *supra.*

was the reason given Gaines for his overpayment. Plaintiff Yamasaki was told that "a processing error' caused an overpayment to be sent to her. All subclass two plaintiffs contacted their district office within thirty days after receipt of the overpayment notice. Recoupment against Elliott and Gaines was deferred pending resolution of this case, whereas recoupment against Yamasaki has been completed. *Elliott, supra* at 965–66.

The *Buffington* plaintiffs resemble subclass one in Elliott. Both Buffington and Biner are recipients of Social Security old-age benefits. Based on "annual earnings reports" submitted by plaintiffs, the Secretary determined that they had received overpayments of benefits, and consequently sought to recoup the overpayments from future benefits.[7]

In 1973 Mrs. Buffington was entitled in her own right to old-age Social Security benefits of $80.50 per month. Based upon her husband's earnings record, she was also entitled to wife's benefits of $15.70 a month, resulting in total monthly benefits of $96.20 (she actually was receiving $89.90 per month due to monthly Medicare deductions of $6.30). In September 1973, plaintiff's husband filed an annual earnings report which showed that he had received earnings in 1972 which exceeded the

[7] Pursuant to 42 U.S.C. § 403(b), deductions from Social Security benefits must be made when a beneficiary's earnings exceed the amount prescribed by statute. To determine whether deductions are appropriate in any given case, a beneficiary who earns more than the statutory maximum is required to file an "annual earnings report" which sets forth the amount of wages earned by the beneficiary during the preceding year. The Social Security application form, and certain pamphlets sent to beneficiaries, advise the claimants of the filing requirement.

statutory limit. Accordingly, the Secretary determined Mrs. Buffington to have been in receipt of a total overpayment of $78.60. Notice of the overpayment was sent to Mrs. Buffington on October 3, 1973, indicating that the overpayment would be withheld from her next benefit check. In early November she received a Social Security check in the amount of $11.30. Mrs. Buffington subsequently submitted a request for reconsideration to the local administrative office. On July 24, 1974 her request was denied and the original overpayment determination was sustained.

Mrs. Biner was found entitled to old-age social security benefits in November 1970. In November 1972, however, she notified her claims representative that she intended to cease working in December 1972.[8] The Social Security Administration in 1972 sent Mrs. Biner three checks in a total amount of $2,216.20, representing benefits for all of 1972.[9] However, the

[8] There is considerable dispute as to whether plaintiff Biner also informed the district office that her earnings would not exceed the statutory maximum in 1972. The Secretary contends that plaintiff represented to her claims representative that she would not have earnings above $1,680 for the year 1972, and that based upon this representation the Secretary issued Mrs. Biner $2,216.20 in excess benefit checks. Plaintiff Biner, on the other hand, claims that her purpose in contacting the local office was to ensure that she would begin receiving her benefits promptly after her retirement in December 1972, and, as such, would only have had cause to inform the office of the date of her retirement, not the amount of income she earned during 1972. In any event, she exceeded the earnings maximum in 1972—the year for which she received the benefit checks at issue here.

[9] It is unclear whether Mrs. Biner knew or should have had reason to know that these checks represented benefit payments for the year 1972. The Secretary contends that enclosed with at least the first check was a letter which indicated that the check was intended as back payment for 1972. Excerpts of this letter which are quoted in the affidavit of the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration do not bear this out. On the other hand, Mrs. Biner asserts that no explanation whatsoever was furnished by the Administration articulating the purpose in its sending this check.

Administration subsequently discovered as a result of a cross check with her former employer, that she had earned income in excess of the statutory amount for 1972. Thereupon, the Secretary requested Mrs. Biner to file an annual earnings report, which she submitted on August 28, 1973; and it was upon this basis that the overpayment was determined.

In the latter part of September 1973, Mrs. Biner was notified that she had been overpaid, and, consequently, that her benefits would be suspended until the entire amount had been recouped. She was also supplied with a facsimile of the form letter referred to earlier. She received no benefit checks for October 1973. In mid-October 1973 Mrs. Biner received a letter from the Administration containing "waiver" forms which she was instructed to fill out and return to the distict office if she wished to do so. Mrs. Biner completed the forms and mailed them to the local office. However, submission of this request for waiver consideration did not halt recoupment proceedings. Moreover, on November 19, 1973 Mrs. Biner was informed that she was at fault in retaining the checks and, consequently, no waiver would be permitted. She was also informed that the original suspension of her benefits had been adjusted so that $50.00 per month would be withheld from her regular benefit payments.

During the latter part of 1973 Mrs. Biner twice requested reconsideration of the Secretary's overpay-

ment decision. Again, recoupment was not halted. On April 8, 1974, however, the Secretary adhered to his initial determination that recoupment was appropriate, and continued to deduct amounts from Mrs. Biner's susequent benefit checks. In late May or early June of that year, Mrs. Biner requested and was granted on October 21, 1974 an administrative hearing to review the propriety of the Secretary's recoupment decision. After oral hearings, the administrative law judge sustained the Secretary's decision.

MANDAMUS JURISDICTION UNDER 28 U.S.C. § 1361

The Secretary contends that the district courts erred in assuming jurisdiction over these cases pursuant to the federal mandamus statute, 28 U.S.C. § 1361. We disagree. For the reasons discussed below, we find this to be an appropriate case for mandamus jurisdiction.[10]

In *Knuckles* v. *Weinberger,* 511 F. 2d 1221 (9th Cir. 1975) and in *Workman* v. *Mitchell,* 502 F. 2d 1201 (9th Cir. 1974), this Circuit has held that man-

[10] We note that § 405(g) jurisdiction is also available for the named plaintiffs. *Mathews* v. *Eldridge*, 424 U.S. 319, 328–32, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976). It was not addressed below, presumably because, prior to *Eldridge*, it was thought to be unavailable. There are some potential problems with the adequacy of § 405(g) jurisdiction in cases of this sort, which lead us to the conclusion that mandamus jurisdiction remains appropriate. It is not entirely clear that relief for the class is available under § 405(g) jurisdiction, because of the exhaustion problems for class members posed by *Weinberger* v. *Salfi*, 422 U.S. 749, 755, 764, 95 S.Ct. 2457, 45 L. Ed. 2d 522 (1975). Furthermore, there is some uncertainty whether district courts may issue injunctions applicable to a class under § 405(g) jurisdiction. *Id.* at 763 n. 8, 95 S.Ct. 2457. In light of the uncertainties in the adequacy of § 405(g) class relief, we think mandamus is appropriate.

damus lies both to compel compliance with due process requirements and to provide the court jurisdiction "to declare the due process requirements applicable to [the challenged] proceedings." *Workman, supra,* at 1206. Mandamus has traditionally been viewed as appropriate to compel officials to comply with the law when "the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Jarrett* v. *Resor,* 426 F. 2d 213, 216 (9th Cir. 1970). There is no conflict between the *Knuckles* rule, which we re-affirm today, and the traditional limited scope of mandamus.[11]

The fact that the district courts were required to analyze the Secretary's procedures in light of the fifth amendment in order to rule on the appropriate form of notice and hearing, does not render the Secretary's duty so unclear as to be beyond the reach of mandamus "[O]nce the court interprets the law, the defendant's duty will be clear; the court is not telling the defendant how to exercise his discretion." *Knuckles, supra,* at 1222.

Thus the trial courts properly found jurisdiction. Here we are concerned with the *duty* of the Secretary to provide certain minimum due process notice and hearing opportunities to Social Security recipients subject to recoupment. *Frost* v. *Weinberger,* 515 F. 2d 57, 62 (2d Cir. 1975), *cert. denied,* 424 U.S. 958, 966 S. Ct. 1435, 47 L. Ed. 2d 364 (1976); *Martinez* v. *Richardson,* 472 F. 2d 1121, 1125–26 & n. 12 (10th Cir. 1973). It is a strict fifth amendment issue, and the

[11] Nor is there any conflict with *Baker* v. *Mathews*, 538 F. 2d 855 (9th Cir. 1976); and *RoAne* v. *Mathews*, 538 F. 2d 852 (9th Cir. 1976). Those cases did not involve due process claims, but involved non-constitutional claims for refunds, which like claims for benefits, should be addressed via § 405(g) only after exhaustion of administrative remedies.

question of discretion does not arise. The Secretary has either met his constitutional duty to provide a certain minimum, or he has not. He has no discretion to provide less than that constitutionally required.

Nor are the present suits precluded by 42 U.S.C. § 405(h) which controls judicial actions to recover benefits. *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975) interprets § 405(h) to require that claims for benefits be asserted only through 42 U.S.C. § 405(g). The instant suits are quite different. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts.[12] *See Eldridge, supra,* 424 U.S. at 329–332, 96 S. Ct. 893.

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[12] The recent case of *Califano* v. *Sanders*, 430 U.S. 99, 97 S. Ct. 980 51 L. Ed. 2d 192 (1977) does not persuade us otherwise. In distinguishing *Eldridge and Salfi* the Court in *Califano* included some dicta suggesting that if jurisdiction had not been found in those cases under § 405(g) the federal forum would have been closed to colorable constitutional claims:

"Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. Furthermore, since federal-question jurisdiction under 28 U.S.C. § 1331 is precluded by § 205(h), *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 761, 95 S. Ct. 2457, a decision denying § 205(g) jurisdiction in *Salfi* or *Eldridge* would effectively have closed the federal forum to the adjudication of colorable constitutional claims. At 109, 97 S. Ct. at 986."

Unlike benefits cases wherein the purpose of the administrative process is served by requiring all actions to proceed through administrative review before appeal to the courts, questions of due process benefit little from administrative exhaustion. There is a need for prompt resolution of such questions, *Eldridge, supra,* 424 U.S. at 330, 96 S. Ct. 893, and they are typically beyond the competence of the Secretary to decide. On the contrary, the development and fine-tuning of notions of due process is peculiarly the province of the courts.

Thus, while the language of § 405(h) precludes "judicial action to recover on any claim arising under this subsection," [emphasis added] it simply does not address the question of due process. Unless the question sought to be litigated is within the express language of the limiting statute, there is no basis for concluding that Congress sought to limit or preclude

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While this could be read to imply that the Court was precluding mandamus jurisdiction for due process claims, there is no reason to do so. The question of § 1361 jurisdiction was not before the Court in *Califano*, and it had been specifically left open even after argument in *Eldridge*, 424 U.S. at 332, 96 S. Ct. 893, n. 12. Furthermore, the very next sentence in *Califano* leads us to believe that the Supreme Court was not sounding the death knell for mandamus jurisdiction by this dictum:

"Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence. *Id.*, 422 U.S. at 762, 95 S. Ct. [2457], 2465; *Johnson* v. *Robison*, 415 U.S. 361, 366–67, 94 S. Ct. 1160, 1165–66, 39 L. Ed. 2d 389 (1974). At 109, 97 S. Ct. at 986."

judicial review. *Salfi, supra,* 422 U.S. at 761–762, 95 S. Ct. 2457.[13]

Nor does any clear and convincing evidence exist that Congress intended to limit mandamus jurisdiction at all by § 405(h). Section 1361 did not exist when § 405(h) was enacted in 1935 precluding jurisdiction under section 41 of Title 28 for recovery of Social Security claims.[14] In at least one other instance

[13] In *Salfi* the claimants argued that their position paralleled that of the claimants in *Johnson* v. *Robison*, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974), wherein the Court found jurisdiction under the analogous Veterans' Administration statute, 38 U.S.C. § 211(a). But *Salfi* pointed out that § 211(a) precludes review only of decisions of the Veterans' Administration, and the question raised in *Johnson* did not involve a decision, and thus was not precluded by that statute. It went on to say that the Social Security section at issue, § 405(h), has a broader preclusionary reach which is not limited to decisions only, but "extends to any 'action' seeking to recover on any [Social Security] claim," thus precluding Salfi's action for benefits. *Salfi, supra,* 422 U.S. at 761–762, 95 S. Ct. at 2465. Thus, the Court has indicated that the proper interpretation of statutes limiting judicial review of agency actions is a strict one, excluding only those matters expressly addressed by the statute. Since § 405(h) addresses only those actions brought "to recover on any claim" it does not preclude the instant suits, which are not for recovery of benefits.

The Tenth Circuit has also concluded that *Salfi* does not bar mandamus jurisdiction in this type of case. *Ryan* v. *Shea*, 525 F. 2d 268, 272 (10th Cir. 1975). *Cf., Humana of South Carolina, Inc.* v. *Mathews*, 419 F. Supp. 253, 256–258 (D.D.C. 1976).

[14] 42 U.S.C. § 405(h): "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

where Congress intended a statutory limitation to encompass § 1361, a specific amendment to the limiting statute was made.[15]

THE CLASS ACTION

The district court in *Elliott* certified two subclasses of Hawaiian residents: 1) old-age beneficiaries subject to recoupment as a result of their own annual income reports, and 2) old-age and disability beneficiaries subject to recoupment for all other reasons. Each subclass was represented by named plaintiffs. The court ordered (a) the posting of a notice in every local social security office; (b) the publishing of an advertisement in a non-legal section of two newspapers of general circulation; and (c) the inclusion of a notice of the suit in every letter from the Administration informing the recipients of its overpayment determination. The notice informed the members of the class of the pendency of the suit, of their right to intervene, and

When § 405(h) was enacted in 1935, section 41 of Title 28 contained all of that title's grants of jurisdiction to district courts, including § 1331's predecessor. *See* 28 U.S.C. § 41(1) (1940). It did not contain any grant to federal courts to entertain actions in the nature of mandamus. It was not until 1962 when Congress, in enacting § 1361, extended to all federal courts jurisdiction to hear suits seeking mandamus relief—such jurisdiction prior thereto reposed only in the federal courts of the District of Columbia. Thus, § 1361 actions cannot be considered precluded under § 405(h) simply because § 1361 did not exist when § 405(h) was enacted. One might argue that Congress intended all further additions to Title 28's grants of jurisdiction to be, by the mere statutory location of those additions, subsumed within the proscription of § 405(h). However, no such congressional intent is anywhere evidenced.

[15] 38 U.S.C. § 211(a) (1970), *amending* 38 U.S.C. § 211(a) (1958); 2 U.S. Code Cong. & Admin. News, at 3729–31 (1970).

of their right to question the adequacy of their representation. The government takes no issue with the *Elliott* court's class certification order or with the adequacy of the notice provided.

The *Buffington* court certified the two named plaintiffs as representatives of a nation-wide class of persons eligible for social security old-age and survivors' benefits under 42 U.S.C. § 402 "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court excepted from the class residents of Hawaii and the Eastern District of Pennsylvania and those individuals involved in other litigation challenging the Secretary's procedures in recouping benefits without prior notice and hearing. No notice was provided members of the certified class.

The Secretary contends that the failure to provide notice to the class was a violation of due process and that the class order must be declared invalid, reducing the effect of the judgment solely to the two individuals named as plaintiffs. The Secretary further argues that the district court abused its discretion in certifying a nation-wide class. We disagree.

There is little doubt that the district court's certification order satisfied the terms of Fed.Rule of Civ.Proc., Rule 23(c) (1) and (3). Furthermore, contrary to the Secretary's suggestion, this action is plainly of the type described in Rule 23(b)(2), not 23(b)(3). Although plaintiffs sought recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a preceding hearing. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23(b)(2). *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971).[16] In any event, the *Buffington* court's judgment did not award plaintiffs damages.

The Secretary contends that the *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1971) notice requirement should be extended to cover all class actions, including (b)(2) class actions. However, even the Eisen Court acknowledged that the notice requirements of subdivision (c)(2) are inapplicable to (b)(2) class actions. *Id.* at 177 n. 14, 94 S. Ct. 2140. Rather, Rule 23(d)(2) operates to make notice discretionary with the court in (b)(2) actions. The weight of authority supports the interpretation that due process does not require notice in every (b)(2) class action.[17] Only when necessary to

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[16] In this respect these suits resemble Title VII class actions. Back pay awards are simply part of the equitable relief available in conjunction with the primary injunctive relief to eliminate race or sex discrimination. *E.E.O.C.* v. *Detroit Edison Co.*, 515 F. 2d 301, 308 (6th Cir. 1975), appeal pending.

[17] *See United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 878 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1684, 48 L. Ed. 2d 187 (1976); *Frost* v. *Weinberger*, 515 F. 2d 57, 65 (2d Cir. 1975), cert. denied, 424 U.S. 958, 96 S. Ct. 1435, 47 L. Ed. 2d 364 (1976); *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir. 1974), cert. denied, 419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974); *Yaffe* v. *Powers*, 454 F. 2d 1362, 1366 (1st Cir. 1971); *American Financial System, Inc.* v. *Harlow*, 65 F.R.D. 94, 111 (D. Md. 1974); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980, n. 10 (D. D. C. 1972), aff'd. 159 U.S. App. D.C. 57, 486 F. 2d 1317 (1973); *Johnson* v. *City of Baton Rouge, La.*, 50 F.R.D. 295, 299 (E. D. La. 1970); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968); 3B Moore's Fed. Prac. ¶ 23.55, at 23–1152; 7A Wright & Miller, Fed. Pract. & Proc., Civil § 1786 (1973) [notice not required in (b)(2) action]. *Contra, Schrader* v.

provide class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the action to, for example, submit views as *amici curiae,* does due process require the direction of some sort of notice to absent members of a (b)(2) class. In the instant case no such special circumstances exist to impel us to overturn the *Buffington* court's decision not to provide notice.

Plaintiffs here are represented by skilled and experienced counsel. Their record here and at the district court level is testimony to this commendation. When, as here, absent members' interests are adequately assured of being represented, no significant factual dispute is in need of resolution, the only issues raised are constitutional, and there is no serious question as to the competency of counsel, notice to the class serves no apparent purposes. *Lynch* v. *Household Fin. Corp.,* 360 F. Supp. 720 (D. Conn. 1973); *Woodward* v. *Rogers,* 344 F. Supp. 974, at 980 n.10 (D.D.C.1972). The presentation of additional individual claims would have complicated the suit and protracted it to the detriment of the class as a whole. The named plaintiffs' claims are typical of the class, and additional plaintiffs are unnecessary. The constitutional issues involved in the suit have been exhaustively briefed by counsel, thus rendering additional supplementation by absent members as *amici curiae* superfluous, *Watson* v. *Branch County Bank,* 380 F. Supp. 945, 960 (W.D. Mich. 1974). For all intents and purposes, the class

Selective Service Sys. Loc. Bd. No. 76, 470 F. 2d 73, 75 (7th Cir. 1972), cert. denied, 409 U.S. 1085, 93 S. Ct. 689, 34 L. Ed. 2d 672 (1972); *Zeilstra* v. *Tarr*, 466 F. 2d 111, 113 (6th Cir. 1972) [notice required].

members of the instant class have received their functional equivalent to a day in court.[18]

The Secretary's claim that the *Buffington* court abused its discretion in certifying a nation-wide class is similarly unpersuasive. In reviewing the designation of a class by the trial judge the appellate court should allow the broadest discretion. *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F. 2d 295 (2d Cir. 1969). Furthermore, nothing in Rule 23 indicates that a class should not be designated because it is too large. Certification of a national class action is not unknown in the federal courts. See *Woodward* v. *Rogers, supra.* The Secretary does not cite, nor can we find, any authority which supports his rather novel theory limiting (b)(2) class actions because of their numerosity and manageability problems. By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2), class action. There are simply no manageability problems in these suits.

In short, the *Buffington* suit strikes us as the classic type of action envisioned by the drafters of Rule 23 to

[18] That Buffington's class determination forecloses absent members from bringing individual suits thereafter, in and of itself is not a factor militating against certification of a (b)(2) class action. If it were otherwise, no class actions could ever be certified under (b)(2). This is so because in (b)(2) actions absent members, regardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid *res judicata* effects of the judgment entered therein. *Compare Air Line Stew.* v. *American Airlines, Inc., supra*, 490 F. 2d 636, 642 (7th Cir. 1973) with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76, supra*, 470 F. 2d at 75. Indeed, (b)(2) actions are generally preferred for their wider *res judicata* effects. *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 447 (5th Cir. 1973).

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be brought under subdivision (b)(2). The Secretary has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief with respect to the whole class is appropriate. It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. Multiplicity of actions based on the same constitutional claims advanced here would inevitably result. Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice.

THE REQUIREMENTS OF DUE PROCESS

Social Security beneficiaries whose old-age or disability payments are subject to suspension or reduction under the Secretary's recoupment procedures have a right to due process. Plaintiffs' interest in their monthly benefits amounts to a statutory entitlement constituting a property interest protected under the due process clause of the fifth amendment. *Mathews* v. *Eldridge,* 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Goss* v. *Lopez,* 419 U.S. 565, 573, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); 42 U.S.C. § 401 *et seq.*[19] A

[19] The Secretary contends that when a recipient seeks a waiver, he has no property interest in the amounts overpaid deserving of due process protection. This argument is untenable.

A Social Security recipient has a statutory right to waiver if he is without fault and is financially dependent on the benefits, or has detrimentally relied on the overpayment. Waiver is not a matter of "government beneficence," as the Secretary puts it. Under

suspension or reduction in old-age or disability benefits imposed by a recoupment is not a *de minimis* deprivation outside the protection of due process. *See Goss, supra* (wherein the Court found a 10-day suspension from school not to be *de minimis*). Therefore, they may be deprived of their full benefits only through procedures according them due process of law.

More difficult, however, is determining the form of process to which plaintiffs are due. The Supreme Court set out a three part test for determining the specific dictates of due process in *Mathews* v. *Eldridge, supra,* 424 U.S. at 335, 96 S. Ct. at 903;

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Gold-*

§ 404(b) waiver is not discretionary, but mandatory, under the conditions specified. Thus, the statute creates a property interest in retention of overpayments if the conditions of waiver are met, even if there was no right to receive the overpayments in the first place. That property interest commands due process protection. As the Supreme Court observed in *Roth, supra,* 408 U.S. at 577, 92 S. Ct. at 2709, "[T]he welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they migh attempt to do so."

berg v. *Kelly, supra,* 397 U.S. at 263–271, 90 S. Ct. [1011], 1018–1022.

Our analysis must apply the foregoing test to the facts of the instant cases, guided by the factual characteristics of welfare terminations, *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), and disability insurance terminations, *Eldridge, supra.*

I. THE PRIVATE INTEREST

As in both *Goldberg* and *Eldridge* the plaintiffs' sole interest is in the uninterrupted receipt of benefits pending final administrative decision on his claim. *Eldridge, supra,* 424 U.S. at 340, 96 S. Ct. 893. However, as *Eldridge* indicated, the strength of the interest in the ~~recipient~~ RECEIPT of benefits is a key factor in determining whether a prior oral hearing is necessary. *Eldridge* found that the interest of a disability insurance recipient in his benefits is less strong than that of the *Goldberg* welfare recipient. The Court reasoned that whereas welfare is the last step before complete destitution, disability benefits are not, since a terminated disability recipient who is impoverished could resort to welfare. Therefore, the disability recipient's interest requires less rigorous due process protections, since the potential deprivation is not so extreme. *Eldridge* also based its conclusion on the fact that the disability insurance program is not need-based, so erroneous termination would not necessarily cause financial disaster. Hence, the Court in *Eldridge* found that the personal interest of disability insurance recipients did not in itself invoke the need for a pre-termination hearing.

We find that the strength of the interest of the plaintiffs in the present cases lies somewhere between

Eldridge and *Goldberg.* Although the old-age and survivors program is partially need-based,[20] the victims of erroneous recoupment generally can resort to welfare if in financial need.[21] Standing alone, this falls short of compelling an oral pre-recoupment hearing.

II. RISK OF ERRONEOUS DEPRIVATION

The next factor to be considered is "the fairness and reliability of the existing pre[recoupment] procedures, and the probable value, if any, of additional procedural safeguards." *Eldridge, supra,* 424 U.S. at 343, 96 S. Ct. at 907. In analyzing the risk of erroneous deprivation of the private interest caused by the Secretary's recoupment procedure we must look at the type of question the procedure is required to answer. There are two separate ways to dispute recoupment: reconsideration and waiver. Each involves different

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[20] Unlike the disability insurance program, which is not need-related, the old-age and survivors benefits program is need-based insofar as benefits are reduced by a large percentage of any income to the recipient above a very low exemption. This "tax" on non-exempt income is similar to many welfare systems which put a high tax on earned income by reducing welfare benefits by a corresponding high percentage of the earnings.

Nevertheless, both programs are governed by the same code sections, and it is difficult to imagine that persons subject to a reduction in benefits under one program should have a greater interest than one subject to complete termination in a related program. In the absence of a showing that the welfare available to terminated disability recipients is not available to impoverished old-age and survivors recipients, we can not say the plaintiffs in the instant case have a personal interest more like *Goldberg* than *Eldridge.*

[21] However, under certain limited circumstances, the Social Security program may be the "last step", raising the interest to the *Goldberg* level. See discussion *infra* at 1233–1234.

types of questions. Due process requires a procedure which provides notice and an "effective means for the recipient to communicate his case to the decision-maker." *Eldridge, supra,* 424 U.S. at 345, 96 S. Ct. at 907; *Goldberg, supra,* 397 U.S. at 269, 90 St. Ct. 1011.

A. *Reconsideration*

A reconsideration request addresses the question of whether an overpayment actually occurred. The reconsideration determinations here involve questions which, like the questions in *Eldridge,* are well suited to resolution by documentary proof, e.g., arithmetic computations when amounts are in controversy, and cancelled checks when the receipt of a payment is in dispute. Because written submissions are adequate to effectively communicate these matters, there is no undue risk of erroneous deprivation caused by the present procedures. Therefore, *Eldridge* dictates that the reconsideration claimants here are not constitutionally entitled to a prior oral hearing.[22]

We decline however to rule that reconsideration requests would never require prior oral hearings, for it is conceivable that cases may arise in which the credibility of the claimant may be determinative of the outcome. If a reconsideration claim raises such an issue, the claimant should be entitled to an oral pre-recoupment hearing.

B. *Waiver*

Section 404(b) requires the Secretary to waive recoupment on request of a claimant who is without fault in the overpayment if the recoupment will defeat the purpose of the subchapter or be against equity and good conscience.

[22] Plaintiffs have not attempted, in light of *Eldridge*, to argue that reconsideration cases generally require a prior oral hearing, despite the trial court's ruling in their favor on this point.

The questions raised in a waiver determination are fault, financial dependence, and detrimental reliance. These are significantly different from those faced in the disability insurance termination in *Eldridge,* and more closely resemble those addressed in *Goldberg.*

The question to be answered in a disability insurance hearing is whether the worker is unable to engage "in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." The impairment claimed must be demonstrable by "medically acceptable clinical and laboratory diagnostic techniques" *Eldridge, supra,* 424 U.S. at 343, 96 S. Ct. at 907.

Furthermore, the pre-termination procedures in the disability insurance termination cases consist of extensive fact-finding aimed at establishing the medical condition of the claimant by relatively objective evidence. As the Supreme Court emphasized in *Eldridge,* the test for continued eligibility for disability benefits hinges on a medical assessment of the worker's physical or mental condition, which "[i]s a more sharply focused and easily documented decision than the typical determination of welfare entitlement." *Eldridge, supra,* 424 U.S. at 343, 96 S. Ct. at 907.

Finally, the sources of such information are typically able to communicate effectively through written documents, and the information to be conveyed is more amenable to written than to oral presentation in disability cases. *Id.,* at 345, 96 S. Ct. 893. The Court in *Eldridge* placed great weight on the fact that disability determinations turned largely on "routine, standard, and unbiased medical reports by physician

specialists." *Id.*, at 344, 96 S. Ct. at 907, rather than on questions of credibility and veracity, which render written submissions "a wholly unsatisfactory basis for decision." *Id.*, at 344, 96 S. Ct. at 907; *Goldberg, supra,* 397 U.S. at 269, 90 S. Ct. 1011.

In waiver determinations the trier of fact must address the question of fault, which rests peculiarly upon the credibility of the claimant and the other witnesses, and can not be ascertained solely from written submissions. As noted recently in *Pence v. Kleppe,* 529 F. 2d 135, 143 (9th Cir. 1976), "written documents do not allow the trier of fact to assess the demeanor and attitude of the various witnesses and thereby test their credibility." Unlike a disability determination, a decision of whether a person is at fault requires that the decisionmaker see the person, size up the testimony, and have an opportunity to question the individual about the circumstances involved in his claimed failure to recognize that an overpayment was made.

In determining fault in a waiver claim, the decisionmaker is required to evaluate the claimant's story in light of "all pertinent circumstances, including his age, intelligence, education, and physical and mental condition." 20 C.F.R. § 404.507. It is not plausible to expect the decisionmaker to make a judicious evaluation of the claimant's personal characteristics and circumstances merely from the file and submitted papers.

The fact situations in which the fault issue arises are varied and can be complex. An inquiry into the state of mind of the claimant is required to determine whether the events posited in 20 C.F.R. § 404.510 have occurred. Findings under this regulation hinge on such matters as reasonable belief, reliance, unawareness, lack of knowledge, and failure to understand.

In addition, § 404.511 states that an individual who has shown lack of good faith or has failed to exercise a high degree of care will not be "without fault." The care component of this determination is tempered by the recognition that the degree of care required may vary with the complexity of the circumstances by the capacity of the payee to realize that he is being overpaid, and by the requirement that the "variances in personal circumstances and situations of individual payees are to be considered in determining whether the necessary degree of care has been exercised * * *."

"The objective [of due process] is to ensure that the agency will acquire the information it should have in a manner fairly calculated to illuminate the issues for reasoned decision making." *City of Santa Clara, Cal.* v. *Kleppe,* 418 F. Supp. 1243, 1260 (N. D. Cal. 1976); *cf. Pence* v. *Kleppe,* 529 F. 2d 135, 140–143 (9th Cir. 1976). As the facts of plaintiff Biner's case graphically illustrate, these regulations can not be properly administered without an oral hearing. While the Administration conceded that Mrs. Biner may not have been at fault in receiving the overpayment checks in 1972, it nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. Find-

ing fault on the basis of the ambiguous letter enclosed with the first overpayment check sent her, without giving her an opportunity to explain in person what she thought it meant, is simply inadequate.

Emerging from our analysis of the regulations under which § 404(b) is administered is the conclusion that the decision which must be reached in a fault determination is highly subjective, highly individualized, and highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation.[23]

Thus it is clear that the risk of erroneous deprivation is greatly increased by the present system which does not provide an adequate opportunity for the claimant to communicate his case to the decisionmaker on the issue of fault. Likewise, it is clear that an oral prerecoupment hearing would provide such an opportunity for resolving fault questions.

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[23] The Secretary seizes upon the fact that 20 C.F.R. § 404.507 utilizes the objective standard ("Knew or should have known") for determining fault rather than an entirely subjective one (actual knowledge being the sole determinant) in arguing that this standard precludes the need for an oral hearing. But this misconstrues the objective, or "reasonable person", test. The decisionmaker has to hear the claimant's story and perception of the facts in order to determine whether he should "should have known." To say that the decisionmaker need not hold a hearing, just because in some cases claimants will fail to meet their burden after testimony, is absurd. Since § 404.507 requires the reasonable person to be viewed in the claimant's own circumstances and with whatever mental and physical limitations the claimant might have, the claimant must be given an effective opportunity to communicate these characteristics to the decisionmaker. The very test which might permit a decision on documentary evidence alone as a matter of administrative law, is itself dependent upon information which can effectively be adduced only at an oral hearing.

The waiver determination is a two-step process. If the recipient establishes his lack of fault in receiving and retaining the overpayment, the Secretary must then determine whether recoupment would "defeat the purpose of the subchapter or be against equity and good conscience." 42 U.S.C. § 404(b).

The meaning of the phrase "defeat the purpose of this subchapter" is found in § 404.508 which defines it to mean depriving a person of income required for ordinary and necessary living expenses.

Generally, evidence of living expenses can be adequately presented by written and documentary submissions. Check stubs, copies of budgets, estimates of expenses, and the like can be communicated well in this form.

However, there is one exception which may come into play when the recipient claims financial dependence on the benefits. As discussed above, *Eldridge* did not require an oral hearing in light of financial need, on the assumption that one could go on welfare. As long as the termination or reduction is from a program which is not the "last step" then the personal interest standing alone can not compel a prior oral hearing. That is the general rule. But a situation may exist where a claimant is dependent on the Social Security benefits for existence and welfare is not available despite that person's severe financial need. In that situation only, Social Security becomes the "last step," and the strength of the personal interest becomes identical with *Goldberg*.

The other component of waiver is "equity and good conscience." It involves those situations where a person has relied on a payment or notice of payment, and has relinquished a valuable right or changed posi-

tion detrimentally as a result. Financial need is irrelevant to this component. 20 C.F.R. § 404.509. Deciding whether the recipient has detrimentally relied on an overpayment resembles the fault determination. The decisionmaker will have to answer the same types of questions as in the fault, context; e.g., state of mind, credibility, and whether under the circumstances the claimant would have changed position anyway without the overpayment. Purely documentary submissions are inadequate to show what motivation or set of operational facts the claimant considered in performing an act or refraining therefrom. Nor can they address the question of causality which a claim of reliance implies.

The above analysis indicates that most of the factors involved in a waiver determination are not capable of resolution by written submissions. Therefore, the Secretary's current procedure for handling waivers creates an undue likelihood of erroneous deprivation, which could be obviated by pre-recoupment oral hearings.

III. THE GOVERNMENT INTEREST

The final factor to be assessed is the public interest, which includes the administrative burdens associated with requiring an oral hearing prior to recoupment in waiver cases.

There is an understandable dispute as to the actual burden to be borne by the Secretary under a requirement of pre-recoupment oral hearings for waiver requests. No one can say with complete authority how many additional hearings will take place under the guidelines we set down today. A review of the record indicates on the negative side that there will be a modest increase in burden. On the positive side, however, it appears fairly certain that hearings should significantly reduce errors in the decision making process.

The major fiscal difficulty envisioned by the Secretary is the likelihood that the availability of pre-recoupment hearings will result in the filing of a far greater number of requests for reconsideration or waiver.

During oral argument counsel for the Secretary cited statistics that show that the number of hearings on termination of welfare benefits has increased from 19,000 per year to 68,000 per year since the decision of the Supreme Court in Goldberg. Without further clarification, these statistics are of little value. *Cf., Eldridge, supra,* 424 U.S. at 346, 96 S. Ct. 893. They do not disclose what change, if any, has taken place in the success rate of welfare beneficaries who receive a hearing. If the effect of *Goldberg* were to cause the filing of a large number of frivolous requests for hearings by people seeking to delay termination, there might be reason to question the wisdom of *Goldberg.* But if, in fact, the percentage of successful contests has remained constant or declined only slightly, then *Goldberg* has resulted in a large number of correct determinations of the issue of whether welfare benefits should be terminated, and, as such, *Goldberg* has benefited rather than burdened the system.

If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted.

The findings of fact by the courts below strengthen our belief that the increased burden will be minimal. First, very few of the recoupment decisions of the Secretary are challenged in *any* way. Claimants object to less than 1% of the recoupments. Second, when they do object, a high percentage convince the Secretary to reverse himself. Almost three-fourths of the claimants who contest their recoupment win a favorable decision somewhere along the line, and more than one-third of those who reach the post-termination hearing succeed at that stage. *Elliott* v. *Weinberger*, 371 F. Supp. 9660, at 967.[24]

There has been no showing that the percentages of challenges will increase substantially or that the number of hearings will rise inordinately. There may be more requests for waiver and reconsideration when the Secretary's notices are redesigned to provide the information required to fulfill the due process notice requirements noted elsewhere in this opinion. There will also be some increase in hearings reflecting those claimants who would have given up or died before the post-recoupment hearings which under the current procedures are held almost one year after the fact.

Furthermore, the financial burden the Government bears in recoupment cases is substantially lighter than in a termination case. In the latter, as noted in *Eldridge, supra,* 424 U.S. at 348, 96 S. Ct. 893, the Government is forced to continue paying benefits to someone who not only may not be eligible for them, but who in all likelihood will be unable to repay them and may be judgment-proof in the event that he is found

[24] The trial court's figures referred to all disputes, without breaking down each category. Nevertheless, they are useful to show that the relatively few disputes which do occur are quite often meritorious.

ineligible for the amounts paid during the review and termination process.

In the instant case we merely require the Government to exercise a little forebearance before taking money from the claimants via recoupment. There will be few if any situations when payments will be made to ineligible persons during the course of the review. Generally, the claimant's eligibility is not at issue, the only question being whether, or when and how, his payments should be subject to temporary recoupment deductions.

THE ORAL PRE-RECOUPMENT HEARING

Applying the *Eldridge* three element balancing test to the instant cases we conclude that the reconsideration claimants here are not constitutionally entitled to a prior oral hearing.

We conclude from applying the *Eldridge* test to the waiver cases that § 404(b) determinations require an oral pre-recoupment hearing. The questions to be asked and the factors to be considered in a § 404(b) waiver determination can not be adequately handled by written submissions.[25]

The hearing need not take the form of a judicial or quasi-judicial trial. In accordance with *Goldberg* v. *Kelly, supra,* 397 U.S. at 267–71, 90 S. Ct. 1011, the claimant should be afforded the following rights:

1. to present his case orally and to submit evidence with witnesses or documents;
2. to cross-examine adverse witnesses;
3. to be represented by counsel;
4. to have an impartial hearing officer;

[25] This right however does not attach if the claimant raises no disputed fact. *See Mills* v. *Richardson*, 464 F. 2d 995, 1001 (2d Cir. 1972).

5. to receive a statement written by the hearing officer setting forth his decision and the reasons and evidence in support of it; and
6. to receive adequate notice.

NOTICE

Social Security recipients have a due process right to receive adequate notice of recoupment, plainly and clearly communicated. The notice should inform the recipient of the basis for the recoupment, the procedural rights available to the recipient, and the consequences if the recipient exercises those rights. Under present regulations, a notice informing a recipient of these matters might state:

1. the alleged overpayment and the reason for overpayment; [26]
2. the recipient's right to request reconsideration or waiver, or both, and the nature of each; [27]
3. that the recipient must request reconsideration or waiver in writing within thirty days of receipt of notice in order to exercise these rights;

[26] Like the district court in *Elliott* we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of "processing error." The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

[27] It is important that the explanations of these two forms of relief be made *very* clear. Given the difficulty beneficiaries may have in figuring out whether they might qualify for a waiver, or reconsideration, or both in the alternative, and the subtleties which may inhere in determining which is appropriate and whether an oral hearing is required in any given situation, it may be prudent for the Secretary to furnish recipients with forms and additional information for *both* reconsideration and waiver when there is doubt as to which applies. This, however, is not a constitutional imperative.

4. that if waiver is requested, the recipient has a right to a pre-recoupment hearing (as set forth in this opinion);
5. that recoupment will begin unless reconsideration or waiver is requested, in which case recoupment will not begin until the request has been finally disposed of by way of the required review procedure;
6. that the Administration will send appropriate forms upon receipt of a request for reconsideration or waiver, and that the local office will assist the recipient in completing and submitting the forms upon request;
7. any other administrative relief available, and an explanation of how to request it.

The judgments of the district courts are affirmed in part and reversed in part, and the cases are remanded.

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APPENDIX B

United States Court of Appeals For the Ninth Circuit

(No. 74–1611)

EVELYN ELLIOTT AND BENITO MOLINA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND SUNG DAI SEU, INDIIVIDUALLY AND IN HIS CAPACITY AS PACIFIC AREA MANAGER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANTS-APPELLANTS

(No. 74–3118)

FANNIE BUFFINGTON AND FRANCES BINER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANTS-APPELLANTS

ORDER

Before: BROWNING and TRASK, *Circuit Judges,* and WILLIAMS,[1] *District Judge*

[1] Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

[Filed: December 15, 1977; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

No. 74-1611

EVELYN ELLIOTT AND BENITO MOLINA, INDIVIDUALLY CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; AND SUNG DAI SEU, INDIVIDUALLY AND IN HIS CAPACITY AS PACIFIC AREA MANAGER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court of the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part and reversed in part.

[Filed: ~~December 15~~ JULY 1, 1977; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

United States Court of Appeals
For the Ninth Circuit

No. 74-3118

FANNIE BUFFINGTON AND FRANCES BINER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Western District of Washington.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part and reversed in part.

[Filed: ~~December 15~~ JULY 1, 1977; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1611

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES

vs.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare,
DEFENDANTS-APPELLANTS

No. 74-3118

FANNIE BUFFINGTON and FRANCES BINER, Individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS-APPELLANTS

OPINION

[October 1, 1975]

74-1611, Appeal from the United States District Court for the District of Hawaii

74-3118, Appeal from the United States District Court for the Western District of Washington

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Before: BROWNING and TRASK, Circuit Judges, and WILLIAMS,* District Judge

WILLIAMS, District Judge:

These consolidated appeals by the Secretary of the Department of Health, Education and Welfare (hereinafter referred to as the "Secretary") challenge the judgments of two district courts requiring, *inter alia*, the Secretary to provide old-age and disabled social security beneficiaries the opportunity to request a hearing prior to the initiation of recoupment procedures, the purpose of such procedures being the recovery of monies paid to such beneficiaries allegedly in excess of their legal monthly entitlements. In both these class action suits plaintiffs-appellees asserted that the procedures utilized by the Secretary in recouping excess payments denied them due process of law under the fifth amendment because their benefits were reduced or suspended without adequate notice of the reason for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment of the Secretary's recoupment de-

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* Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

cision, and without affording them the opportunity to have a pre-recoupment hearing. *Elliott* v. *Weinberger*, 371 F. Supp. 960, 964 (D. Haw. 1974); *Buffington* v. *Weinberger*, Civil No. 734-73C2 (W.D. Wash., Oct. 22, 1974). The district courts held that mandamus jurisdiction was established under 28 U.S.C. § 1361,[1] and that the recoupment procedures violated the due process rights of these complaining recipients. In addition to providing a hearing to any recipient who requested one, the Secretary was ordered to supply the recipients adequate notice informing them of their right to such a hearing, and the hearing, if requested, had to precede recoupment. While we are in substantial agreement with the general principle that a hearing must be afforded recipients prior to recoupment of their monthly benefits, we do not believe that such a hearing is constitutionally compelled unless the issues raised in a recipient's request for review of the Secretary's initial overpayment and recoupment determination are incapable of resolution upon written submission and/or documentary proof.

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[1] In *Elliott* v. *Weinberger*, plaintiffs asserted that jurisdiction additionally existed under 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* The court in *Elliott*, however, expressly declined to decide whether jurisdiction could be properly predicated upon these sections, but noted in passing that support existed for either jurisdictional base. In *Buffington* v. *Weinberger*, the court found both § 1361 and § 701 *et seq.* to furnish the necessary jurisdictional basis.

The Statutory and Procedural Background

The Social Security Act vests the Secretary with the power to recover lost funds in the event overpayments are made to recipients of old-age or disability benefits. 42 U.S.C. § 404 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . .
>
> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The challenged government procedures are as follows: As of January 1, 1974,[2] all recipients subject to recoupment receive, thirty days before actual recoupment begins, form letters which set forth the reasons for the proposed recoupment, the availability of reconsideration (when a recipient asks for reconsideration, the correctness of the overpayment determination itself is being challenged), the condition for waiver (when a beneficiary requests that his overpayment be waived, he is, in effect, conceding the debt but asking that it be forgiven or reduced), and the need to consult the local Administration office within thirty days if they wish to complain.[3]

[2] At the time these suits were filed, those beneficiaries whose overpayments were determined from their "annual earnings reports" were not entitled to advance notice of recoupment. Rather, recoupment began immediately, subject to later consideration of the beneficiary's request for reconsideration or waiver. Plaintiffs Silva, Ortez, Vaquilar, Biner and Buffington all had recoupment procedures initiated against them on the basis of earnings reports filed with the Secretary. Following January 1, 1974 it has been the Secretary's practice to provide all such beneficiaries the same pre-recoupment notice as in other overpayment cases.

[3] Social Security Claims Manual § 5503(a) requires the Secretary to inform overpaid beneficiaries of their "right to request reconsideration" and of the applicable waiver provisions of the Social Security Act. Contrary to the Secretary's contention, the form letter notice does not apprise a beneficiary of his "right" to waiver consideration. Nor does the Claims Manual require such disclosure. Only the "conditions" of waiver need be revealed. Even as to reconsideration, the form letter fails to make clear that such re-appraisal is a matter of right rather than a mere possibility.

The initial overpayment and recoupment notice sent to beneficiaries makes no mention of the forms needed for reconsideration or waiver, nor sets forth information about how to complete them. However, the beneficiary can obtain review of his case by setting forth, in a letter, the reasons why he opposes the overpayment determination or seeks waiver. When reconsideration or waiver consideration is required, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence offered in support of his claim for relief. No oral hearing is given prior to the commencement of recoupment.

Furthermore, it is the Secretary's policy to immediately defer recoupment action upon the filing of a request for reconsideration or waiver. Claims Manual § 5503(b), (c). Any deferral of recoupment beyond thirty days after the date of the initial notice lies completely within the discretion of the Administration. Although appellants claim that it is the Secretary's policy to defer recoupment indefinitely once a request for reconsideration or waiver has been filed (Claims Manual § 5503(c)), in plaintiff Biner's case social security checks were not forthcoming in either November or October of 1973, notwithstanding the fact that Biner filed a waiver request in mid-October 1973. Appellants attribute this oversight to administrative error.

If, after review of the information supplied by the beneficiary, the Secretary adheres to his initial determination that recoupment is appropriate, he noti-

fies the beneficiary to this effect and resumes the withholding of benefits to satisfy the overpayment. If dissatisfied with this decision, the beneficiary may request an administrative hearing *de novo*, in which the beneficiary is provided an opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. 20 C.F.R. § 404.928-.929. However, recoupment is not suspended pending the outcome of this *de novo* hearing. The beneficiary is further entitled to appeal the hearing examiner's determination to the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945), and to judicial review of the Appeals Council's decision pursuant to 42 U.S.C. § 405(g).

The Facts

In *Elliott*, plaintiffs Silva, Ortiz and Vaquilar (subclass one) were determined to have been overpaid by the Secretary based upon their own annual earnings reports. They all received the form letter previously mentioned indicating the reasons for the overpayment determination, the specific amount overpaid and the amount by which the recipient's subsequent benefit checks would be reduced or suspended altogether. These plaintiffs were additionally apprised of the possibility of reconsideration and the conditions of waiver. All of them contacted the Administration's local offices within thirty days of receipt of the letter. At the time the *Elliott* court rendered its decision, the Secretary had completed re-

coupment against two of these plaintiffs, but as to the other had deferred recoupment pending disposition of the suit.

Plaintiffs Elliott, Gaines and Yamasaki (subclass two) received notices more than thirty days before recoupment was to begin, the notice disclosing information similar that contained in the notices sent to subclass one plaintiffs.[4] Plaintiff Elliott was notified that the overpayment determination was predicated upon "her receipt of both retirement and disability benefits when she was entitled to only disability benefits." *Elliott*, *supra* at 965. "Duplicate payments" was the reason given Gaines for his overpayment, and plaintiff Yamasaki was told that "a processing error" caused an overpayment to be sent to her. All subclass two plaintiffs contacted their district office within thirty days after receipt of the overpayment notice. Recoupment against Elliott and Gaines was deferred pending resolution of this case, whereas recoupment against Yamasaki has been completed. *Elliott*, *supra* at 965-66.

As to plaintiffs Buffington and Biner, their claims arose out of factual situations similar to those pertaining to three of the named plaintiffs in *Elliott*.[5]

Both Buffington and Biner are recipients of social security old-age benefits. Based on "annual earnings reports" submitted by plaintiffs, the Secretary determined that they had received overpayments of

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[4] For a discussion of the major difference see note 2 *supra*.

[5] See note 2 *supra*.

benefits, and consequently sought to recoup the overpayments from plaintiffs' future benefits.[6]

In 1973 Mrs. Buffington was entitled in her own right to old-age social security benefits of $80.50 per month. Based upon her husband's earnings record, she was also entitled to wife's benefits of $15.70 a month, resulting in total monthly benefits of $96.20 (she actually was receiving $89.90 per month due to monthly Medicare deductions of $6.30). In September 1973, plaintiff's husband filed an annual earnings report which showed that he had received earnings in 1972 which exceeded the statutory limit. Accordingly, the Secretary determined Mrs. Buffington to have been in receipt of a total overpayment of $78.60. Notice of the overpayment was sent to Mrs. Buffington on October 3, 1973, indicating that the overpayment would be withheld from her next benefit check. In early November she received a social security check in the amount of $11.30. Mrs. Buffington subsequently submitted a request for reconsideration to the local administrative office. On July 24, 1974 her request was denied and the original overpayment determination was sustained.

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[6] Pursuant to 42 U.S.C. § 403(b), deductions from social security benefits must be made when a beneficiary's earnings exceed the amount prescribed by statute. To determine whether deductions are appropriate in any given case, a beneficiary who earns more than the statutory maximum is required to file an "annual earnings report" which sets forth the amount of wages earned by the beneficiary during the preceding year. The social security application form, and certain pamphlets sent to beneficiaries, advise the claimants of the filing requirement.

Mrs. Biner was found entitled to old-age social security benefits in November 1970. In November 1972, however, she notified her claims representative that she intended to cease working in December 1972.[7] The Social Security Administration in 1972 sent Mrs. Biner three checks in a total amount of $2,216.20, representing benefits for all of 1972.[8] However, the Administration subsequently discovered, as a result of a cross check with Biner's former employer, that Biner had earned income in

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[7] There is considerable dispute as to whether plaintiff Biner also informed the district office that her earnings would not exceed the statutory maximum in 1972. The Secretary contends that plaintiff represented to her claims representative that she would not have earnings above $1,680 for the year 1972, and that based upon this representation the Secretary issued Mrs. Biner $2,216.20 in excess benefit checks. Plaintiff Biner, on the other hand, claims that her purpose in contacting the local office was to ensure that she would begin receiving her benefits promptly after her retirement in December 1972, and, as such, would only have had cause to inform the office of the date of her retirement, not the amount of income she earned during 1972. In any event, she exceeded the earnings maximum in 1972—the year for which she received the benefit checks at issue here.

[8] It is unclear whether Mrs. Biner knew or should have had reason to know that these checks represented benefit payments for the year 1972. The Secretary contends that enclosed with at least the first check was a letter which indicated that the check was intended as back payment for 1972. Excerpts of this letter which are quoted in the affidavit of the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration do not bear this out. *Buffington* Tr. 311. On the other hand, Mrs. Biner asserts that no explanation whatsoever was furnished by the Administration articulating the purpose in its sending this check.

excess of the statutory amount for 1972. Thereupon, the Secretary requested Mrs. Biner to file an annual earnings report, which she submitted on August 28, 1973; and it was upon this basis that the overpayment was determined.

In the latter part of September 1973, Mrs. Biner was notified that she had been overpaid, and consequently, her benefits would be suspended until the entire amount had been recouped. She was also supplied with a facsimile of the form letter referred to earlier. She received no benefit checks for October 1973. In Mid-October 1973 Mrs. Biner received a letter from the Administration containing "waiver" forms which she was instructed to fill out and return to the district office if she wished to do so. Mrs. Biner completed the forms and mailed them to the local office. However, submission of this request for waiver consideration did not halt recoupment proceedings. Moreover, on November 19, 1973 Mrs. Biner was informed that she was at fault in retaining the checks and, consequently, no waiver would be permitted. She was also informed that the original suspension of her benefits had been adjusted so that $50.00 per month would be withheld from her regular benefit payments.

During the latter part of 1973 Mrs. Biner twice requested reconsideration of the Secretary's overpayment decision. Again, recoupment was not halted. On April 8, 1974, however, the Secretary adhered to his initial determination that recoupment was appropriate, and continued to deduct amounts from

Mrs. Biner's subsequent benefit checks. In late May or early June of that year, Mrs. Biner requested and was granted on October 21, 1974 an administrative hearing to review the propriety of the Secretary's recoupment decision. After oral hearings, the administrative law judge sustained the Secretary's decision. Appeal of the judge's ruling is presently pending.

The District Courts Properly Exercised Jurisdiction Under 28 U.S.C. § 1361

The Secretary contends that the district courts erred in assuming jurisdiction over these cases pursuant to the Federal Mandamus statute, 28 U.S.C. § 1361. Mandamus has traditionally been viewed as appropriate to compel officials to comply with the law only when the claim is clear and certain and the duty of the officer is ministerial and "so plainly prescribed as to be free from doubt." *United States* v. *Walker*, 409 F.2d 477, 481 (9th Cir. 1969).

Typically, mandamus has been limited to cases in which statutory or regulatory duties were sought to be enforced. Recently, however, in *Knuckles* v. *Weinberger*, 511 F.2d 1221 (9th Cir. 1975), this court held section 1361 to supply the necessary jurisdictional basis when a constitutional duty is made clear by subsequent judicial interpretation. In *Knuckles* we conclude that a district court had section 1361 jurisdiction to consider constitutional claims asserted against the Department of Health, Education and Welfare's summary suspension of social security payments. In so holding, we made it clear

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that it is not essential to a finding of jurisdiction that the constitutional duty sought to be enforced be clear beyond all doubt from the outset of the litigation. See also *Brown* v. *Weinberger*, 382 F. Supp. 1092 (D. Ma. 1974). All that is required is that plaintiffs avoid asserting unsubstantial claims. *Mead* v. *Parker*, 464 F.2d 1108 (9th Cir 1972); Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Non-Statutory' Judicial Review of Federal Administrative Action," 81 Harv. L. Rev. 308 (1967). If we were bound to first determine the existence of a duty on the part of the Secretary as a prerequisite to finding jurisdiction under § 1361—an approach urged upon us by the Secretary—we would, in essence, be disposing of these cases on their merits—an exercise wholly inappropriate in deciding the threshold question of jurisdiction.

In the instant cases, the allegations contained in the complaints present substantial constitutional claims, namely, that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), compels the conclusion that the precedures instituted by the Secretary deprive plaintiffs of their property without due process of law. While section 404 of the Social Security Act vests the Secretary with discretion in establishing procedures to recover overpayments, he may not institute procedures which violate the fifth amendment. Precedents clearly demonstrate that the applicability of the *Goldberg* rationale to the instant circumstances is not so tenuous as to seriously call into question the substantiality of

plaintiff's claims here. The district courts therefore properly assumed jurisdiction under § 1361 to decide whether the Secretary had abused his discretion.* *Accord Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975); *Mattern* v. *Weinberger*, Civil No. 74-1776 (3d Cir., June 3, 1975) (slip opinion); *Martinez* v. *Richardson*, 472 F.2d 1121 (10th Cir. 1973).

The Class Action

The district court in *Elliott* certified the Silva, Ortiz and Vaquilar plaintiffs as representatives of a subclass of old-age beneficiaries resident in Hawaii subject to actual or possible recoupment of overpayments as a result of their own annual income reports. The Elliott, Gaines and Yamasaki plaintiffs were certified as a subclass representing recipients of old-age and disability benefits resident in Hawaii who were subject to actual or possible recoupment for reasons other than the filing of annual income reports. The court ordered (1) the posting of a notice in every local social security office; (2) the publishing of an advertisement in a non-legal section of two newspapers of general circulation; and (3) the inclusion of a notice of the suit in every letter from the Administrating informing the recipients of its overpayment determination. The notice informed the members of the class of the pendency of the suit, of

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* Having found an adequate jurisdictional basis under the Mandamus Act, it is unnecessary to decide whether the Administrative Procedure Act or 28 U.S.C. § 1331(a) also furnish an independent source of jurisdiction.

their right to intervene, and of their right to question the adequacy of their representation. *Elliott* Tr. 199-201. The Government takes no issue with the *Elliott* court's class certification order or with the adequacy of the notice provided.

The *Buffington* court certified the two named plaintiffs as representatives of a nation-wide class of persons eligible for social security old-age and survivors' benefits under 42 U.S.C. § 402 "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court excepted from the class residents of Hawaii and the Eastern District of Pennsylvania and those individuals involved in other litigation challenging the Secretary's procedures in recouping benefits without prior notice and hearing. *Buffington* Tr. 422-24. No notice whatsoever was provided members of the certified class.

The Secretary contends that the failure to order that notice be provided to the class was a violation of due process and that the class order must be declared invalid, reducing the effect of the judgment solely to the two individuals named as plaintiffs. The Secretary further argues that the district court abused its discretion in certifying a nation-wide class. We disagree.

There is little doubt that the district court's certification order satisfied the terms of Fed. Rule of Civ. Pro., Rule 23(c)(1) and (3). Furthermore, contrary to the Secretary's suggestion, this action is plainly of the type described in Rule 23(b)(2), not

23 (b)(3). Although plaintiffs seek recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a proceeding hearing. It is only logical that as a necessary part of their claim plaintiffs would seek to recover money which they believed to have been retrieved pursuant to the procedures sought to be enjoined. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23 (b)(2). *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). In similar cases, too numerous to cite here, class certification of an essentially (b)(2) action was not precluded simply because monetary benefits were an inevitable by-product of the recovery of the injunctive and declaratory relief prayed for. See cases cited in 3B Moore's Federal Practice, ¶ 23.40, at 23-652 to 23-654 (1974), and 1974 Cum. Supp. at 82 n.19. In any event, the *Buffington* court's judgment did not award plaintiffs damages.

Under Rule 23(c)(2) notice is mandatory in a (b)(3) class action. And the Supreme Court has so held. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Secretary contends that the *Eisen* rationale should be extended to cover all class actions, including, naturally, (b)(2) actions. However, even the *Eisen* Court acknowledged that the notice requirements of subdivision (c)(2) are inapplicable to (b)(2) class actions. *Id.* at 177 n.14. Rather,

Rule 23(d)(2) operates to make notice discretionary with the court in (b)(2) actions.

The weight of authority supports an interpretation—consistent with due process requirements—of Rule 23 which does not require notice in every (b)(2) class action. Compare *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973); *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1971); *Souza* v. *Scalone*, 64 F.R.D. 654, 659 (N.D. Cal. 1974); *Johnson* v. *City of Baton Rouge, La.*, 50 F.R.D. 295, 299 (E.D. La. 1970); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619 (D. Kan. 1968); 3B Moore's Fed. Prac. ¶ 23.55, at 23-1152; 7A Wright & Miller, Fed. Prac. & Proc., Civil § 1786 (1973) [notice not required in (b)(2) action] with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76*, 470 F.2d 73, 75 (7th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972); *Zielstra* v. *Tarr*, 466 F.2d 111 (6th Cir. 1970) [notice required].

The seminal case upon which most, if not all, courts requiring notice rely is the Second Circuit's decision in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968), in which the court by way of dicta stated that "notice is required as a matter of due process in all representative actions." *Id.* at 564. However, in *Frost* v. *Weinberger*, 515 F.2d 57, 65 (2d Cir. 1975), the Second Circuit rejected its earlier pronouncement in *Eisen* and specifically rule that *Eisen's* statements with respect to

notice only applied to class actions brought under provisions of Rule 23 other than (b)(2). Indeed, even before *Frost* some district courts in the Second Circuit resisted *Eisen's* inflexible due process approach to (b)(2) actions, and instead read *Eisen* to say that notice was required in class actions when due process so required. *Lynch* v. *Household Fin. Corp.*, 360 F. Supp. 720, 722 n.3 (D. Conn. 1973).[10]

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[10] Likewise, district courts in the Sixth Circuit have not uniformly chosen to follow the decision in *Zielstra* v. *Tarr, supra*; one court finding *Zielstra's* statement that due process required notice in all class actions purely dictum, "since the Court of Appeals held that the District Court did not have subject matter jurisdiction of the case which was on appeal." *Watson* v. *Branch County Bank*, 380 F. Supp. 945, 960 n.11 (W.D. Mich. 1974). *Cf. Alexander* v. *AVCO Corp.*, 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974).

It is unclear where the Fifth Circuit stands on the notice question. In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969), without discussing due process requirements, the court implied that notice in (b)(2) actions is not required. In Justice Godbold's specially concurring opinion he states that 23(b)(2) "does not require notice." *Id.* at 1127 n.1. Acting in apparent harmony with *Johnson*, the Fifth Circuit affirmed a Florida district court decision which held notice to be inappropriate in (b)(2) class actions. *Mungin* v. *Florida East Coast Ry. Co.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 987 (1971). On the other hand, the Fifth Circuit upheld a district court decision in which *Eisen* was followed and notice was found necessary in a (b)(2) action. *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353-54 (E.D. La. 1970), *aff'd*, 444 F.2d 116 (5th Cir. 1971). Perhaps it is fair to infer that at least the Fifth Circuit does not ascribe to the procrustean view that notice is required in all representative actions, rather whether *vel non* notice is mandated depends on the circumstances involved and the applicability of relevant due process considerations.

Contrary to the Secretary's suggestion that the distinction between (b)(2) actions having monetary repercussions and (b)(3) actions is one solely of form of relief sought and not one of substance, relevant authorities have oft stated that the need for notice in a (b)(2) class action is *de minimis* simply because of its fundamental differences from a (b)(3) suit. As the Advisory Committee in its Note accompanying the proposed revised, now adopted, Rule 23 implies, the strict (c)(2) notice requirement is inapposite to a (b)(2) class because (b)(2) classes will tend to be more cohesive and unified so that adequate representation reduces the need for notice. See 39 F.R.D. 106.

> In representative actions brought under the other provisions of Rule 23(b) [provisions other than 23(b)(3)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. 7A Wright & Miller, *supra*, § 1786, at 143.

To the extent that absent class members might, as a matter of policy disfavor the position taken by named plaintiffs, defendants are usually more than adequate

action to, for example, submit views as amici curiae, are in need of being served, does due process require the direction of some sort of notice to absent members of a (b)(2) class. In the instant case no such special circumstances exist to impel us to overturn the *Buffington* court's decision not to provide notice.

There is no question but that plaintiffs here are represented by skilled and experienced counsel. Their record here and at the district court level is testimony to this commendation. When, as here, absent members' interests are adequately assured of being represented because there are no money damages involved, no significant factual dispute is in need of resolution, the only issues raised are constitutional, and there is no serious question as to the competency of counsel, notice to the class serves no apparent purposes. *Lynch* v. *Household Fin. Corp.*, *supra*; *Woodward* v. *Rogers*, *supra*. The presentation of additional individual claims would have complicated the suit and protracted it to the detriment of the class as a whole. The named plaintiffs' claims are typical of the class, and additional plaintiffs are unnecessary. The constitutional issues involved in the suit have been exhaustively briefed by counsel and fully canvassed in the cases and commentaries, thus rendering additional supplementation by absent members as amici curiae superfluous. *Watson* v. *Branch County Bank*, *supra*. For all intents and purposes, the class members of

stand-in for the purpose of presenting the policy arguments to the court.

> Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.
>
> In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. [*Air Line Stew.* v. *American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973); *Johnson City* v. *City of Baton Rouge, supra; Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966)]. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights. [*Souza* v. *Scalone, supra*, 64 F.R.D. at 659; *Watson* v. *Branch County Bank, supra*, 380 F. Supp. at 959].

We are of the opinion that the better reasoned view counsels against requiring, under due process principles, notice in every (b)(2) action. Only when the purposes in providing class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the

the instant class have received their functional equivalent to a day in court."[11]

The Secretary's claim that the *Buffington* court abused its discretion in certifying a nation-wide class is similarly unpersuasive. In reviewing the designation of a class by the trial judge the appellate court should allow the broadest discretion. *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969). Furthermore, nothing in Rule 23 indicates that a class should not be designated because it is too large. Certification of a national class action is not unknown in the federal courts. *See Woodward* v. *Rogers, supra.* The Secretary does not cite, nor can we find, any authority which supports his rather novel theory limiting (b)(2) class actions because of their numerosity and manageability problems. By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a

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[11] That Buffington's class determination forecloses absent members from bringing individual suits thereafter, in and of itself, is not a factor militating against certification of a (b)(2) class action. If it were otherwise, no class actions could ever be certified under (b)(2). This is so because in (b)(2) actions absent members, regardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid the res judicata effects of the judgment entered therein. *Compare Air Line Stew.* v. *American Airlines, Inc., supra*, 490 F.2d at 642, with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76, supra*, 470 F.2d at 75. Indeed, (b)(2) actions are generally preferred for their wider res judicata effects. *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973).

(b)(2), class action. And as a practical matter, since plaintiffs seek no damages, and because notice is not required to be directed to these class members, there simply are no manageability problems here involved.

In short, the *Buffington* suit strikes us as the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2). The Secretary has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief with respect to the whole class is appropriate. Even if we required the *Buffington* suit to proceed on behalf of the named plaintiffs only, the injunctive relief awarded in this suit would necessarily operate in favor of all social security old-age and survivor benefit recipients. It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. The Administration would be besieged with suits seeking the vindication of each and every social security recipient of old-age and survivors' benefits subject to the Secretary's recoupment procedures. With a copy of this decision in their hands, ever-watchful legal-assistance attorneys would wreak havoc on the administration of the Secretary's recoupment programs. Multiplicity of actions based on the same constitutional claims advanced here would be the inevitable result. Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper,

but it also will effectuate the interests both of judicial administration and of justice.

The Merits

The principal case upon which plaintiffs rely is *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). There the Supreme Court held that a pre-termination evidentiary hearing was required before a welfare recipient's benefits could be terminated. Stressing the recipient's "brutal need" in continued payments, the Court found that in the balance

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. *Goldberg*, *id.* at 266.

Plaintiffs contend that the *Goldberg* decision compels a finding that pre-recoupment hearings are constitutionally necessary when the Secretary determines that overpayments have been made to social security old-age and disability beneficiaries and seeks to recoup those overpayments.

On the other hand, the Secretary argues that, for the following reasons, *Goldberg* should be read narrowly, and thus determined inapposite to the cases here: (1) the Secretary's present "written hearing" is adequate to establish the "probable validity" of the Administration's overpayment determination; (2) the impact upon a social security recipient of a

reduction in or suspension of his or her monthly payments is not severe enough to warrant providing the recipient an oral hearing prior to recoupment; (3) to require such a hearing would result in vast disruption of the Social Security System; (4) in waiver consideration cases no property interest is involved invoking due process safeguards; and (5) no factual issues are presented in reconsideration cases necessitating oral pre-recoupment hearings.[12]

In *Mattern* v. *Weinberger*, Civil No. 74-1776 (3d Cir. June 3, 1975) (slip opinion), all the arguments

[12] In a footnote, the Secretary postulates that since the plaintiffs in *Elliott* whose overpayments were determined by information other than that disclosed in annual earnings reports have as yet had their reconsideration and/or waiver claims acted upon by the Secretary (due to the district court's order prohibiting the Secretary from so acting), "the court's failure to await the Secretary's action on those written requests was plain error." Appellants' Brief in *Elliott*, at 17 n.19. In other words, the Secretary contends that the district court failed to observe the requirement that administrative remedies must be exhausted as a requisite to the initiation of proceedings in a federal court.

However, the case here is to be distinguished from the normal situation in which federal jurisdiction is sought to be invoked to review administrative action. Most often, the courts are asked to scrutinize the merit of an administrative determination, and in that instance, the available avenues of administrative review must ordinarily be exhausted. On the other hand, where, as here, the procedures which the agency contends must be exhausted are themselves the subject of attack, exhaustion is unnecessary. *Finnerty* v. *Cowen*, 508 F.2d 979 (2d Cir. 1974); *Martinez* v. *Richardson*, *supra*, 472 F.2d 1121; *Marsh* v. *County School Bd.*, 305 F.2d 94 (4th Cir. 1962); *Francois* v. *Bushell*, 325 F. Supp. 531 (N.D. Cal. 1971).

advanced here by the Secretary to distinguish the cases at bar from *Goldberg*, as well as the arguments propounded here by the Secretary, in connection with the burden that requiring pre-recoupment oral hearings would impose on the Administration, were fully considered and for the most part rejected. This Court concurs with the Third Circuit's opinion and shares in its conclusion that *Goldberg* requires the Secretary to provide social security beneficiaries with a pre-recoupment oral evidentiary hearing along the parameters and with the qualifications outlined in the *Mattern* decision.

It cannot be seriously maintained that some form of process is not due social security beneficiaries whose old-age or disability payments are subject to suspension or reduction under the Secretary's recoupment procedures. Plaintiffs' interests in their monthly benefits amounts to a statutory entitlement and, therefore, constitutes a property interest protected under the Due Process Clause of the fifth amendment. *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); 42 U.S.C. § 401 et seq. Thus, they may be deprived of their property interests only by due process of law. *Id.* That the deprivation of such property interests does not subject the persons entitled thereto to a "severe detriment or grievous loss" is of no moment in determining whether due process comes into play.

> [F]or in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the in-

terest at stake.' [citations omitted.] [T]he length and consequent severity, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. [citation omitted.] The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. [citations omitted.] *Roth* at 576 (emphasis original.)

A suspension or reduction in old-age or disability benefits imposed in order to recover an alleged overpayment is not a *de minimis* deprivation outside the protection of the due process clause. *See Goss, id.* (wherein the Court found a 10-day suspension from school not to be *de minimis*).

The Secretary contends that where a recipient admits that an overpayment has been made but seek to gain a waiver of recoupment under 42 U.S.C. § 404(b), the recipient has no property interest in the amounts overpaid deserving of due process protection. This argument is untenable. In *Board of Regents* v. *Roth, supra* at 577, the Supreme Court observed that,

> the welfare recipients in *Goldberg* v. *Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they

> had a right to a hearing at which they might attempt to do so.

Thus, the social security beneficiaries here who concede they have been overpaid nonetheless possess a property interest in their right to demonstrate they are eligible for waiver under the terms of 42 U.S.C. § 404(b). Section 404(b) provides a recipient of an overpayment with a statutory right not to have his payments reduced or suspended if he is "without fault" and the recovery would "defeat the purpose" of the Act or "would be against equity and good conscience." It is not a matter of "governmental beneficence," as the Secretary puts it, in his waiving recoupment. Rather, it is a question of complying with the statute. Indeed, under section 404(b) waiver is not discretionary, but mandatory, viz., it provides that "there *shall* be no" recoupment under the conditions specified. "Thus, the fact that [plaintiffs] may not have been entitled to *receive* the overpayment[s] does not mean that [they have] no claim of entitlement to *retain* [them] (or at least to receive the full amount of [their] future monthly payments)." *Mattern* v. *Weinberger, supra* at 26. (emphasis original.)

More difficult, however, is determining the form of process to which plaintiffs are due. The Secretary contends that, except in the "most extraordinary" circumstances as epitomized by *Goldberg* v. *Kelly*, the Supreme Court has not required trial-type hearings prior to a deprivation of a property interest where, as here, the preliminary pre-deprivation procedures

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are sufficient to establish the "probable validity" of the administrative claim.

In *Mattern*, the Third Circuit voiced what we believe to be the crucial flaws in the Secretary's analysis.

> First, the Secretary relies primarily on a line of cases which, while having some relevance on the issue, did not purport to overrule or modify *Goldberg* and are not controlling here. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Of these three decisions, only *Mitchell* indicated that 'probable validity' may be determined in the absence of a prior oral hearing; *Fuentes* and *Sniadach*, in fact, required prior oral hearings. Thus, *Mitchell*, rather than *Goldberg*, represent the exception to the rule. . . . In *Goldberg*, the Supreme Court considered a state welfare procedure in which a claimant had a right, after being interviewed by his caseworker and prior to termination of benefits, to receive a written explanation of the reasons for termination and to submit written information in rebuttal. He also had a right to a full oral hearing *after* termination. 397 U.S. at 258-60. The Court, however, held that this procedure was insufficient and required an oral hearing prior to termination. Since the procedure invalidated in *Goldberg* would seem to be at least effective in ensuring 'probable validity' as the procedure used here, and since the Court in *Mitchell* did not purport to modify *Goldberg*, we refuse to extend the reasoning of *Mitchell* outside the creditor/debtor

> context and to permit *ex parte* determination of 'probable validity' in social welfare cases.
>
> Furthermore, even if *Mitchell's* 'probable validity' analysis were applicable to social welfare cases, the procedure here may not pass muster. . . . The Court upheld the Louisiana sequestration statute challenged in *Mitchell* partly because it provided for an immediate hearing after the writ issued. *Id.* at 618. Thus, the constitutionality of a procedure establishing 'probable validity' without a full oral hearing prior to the property deprivation may depend in part on whether there is an immediate right to an oral hearing afterward. *Mattern*, *supra* at 14-16. (emphasis original.)

As evidenced in the case of plaintiff Biner, however, attending review of the Administration's initial overpayment determination exists a delay of several months between the time recoupment commences and the time a recipient is provided a hearing.

> Finally, if the Secretary's pre-recoupment procedures are to be upheld on the ground that they are sufficient to determine 'probable validity,' they would have to be effective in minimizing the risk of an erroneous determination. *See Mitchell*, *supra* at 618; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), at 170 (Powell, J., concurring) and 188 (White, J., concurring in part and dissenting in part.) However, the Secretary's own figures undercut his contention that the procedures at issue here are effective to minimize erroneous decisions to recoup. In 1970, the only year from which figures have been made avail-

able to us [as is also the case here], over one-third of all persons seeking a post-recoupment hearing (560 out of 1600) obtained reversals.

Therefore, because of a combination of factors —the fact that the Supreme Court has given no indication that *Mitchell's ex parte* 'probable validity' approach is applicable outside the creditor/debtor context, and that such an approach appears to have been at least implicitly rejected in *Goldberg* v. *Kelly*; the substantial delay between the initiation of recoupment and an oral hearing; and the significant reversal rate following post-recoupment hearings—we conclude that the pre-recoupment procedures cannot be defended on the ground that they are sufficient to establish the 'probable validity' of the determination in question. *Mattern*, *id.* at 16-17.

The Secretary also contends that oral hearings are not compelled here because unlike the welfare recipients in *Goldberg* whose benefits were terminated, social scurity beneficiaries whose monthly payments are suspended or reduced through recoupment procedures are not thereby necessarily left destitute. In the Secretary's view, the severity of the impact visited upon plaintiffs here is not of the same quantum as that involved in *Goldberg*, and therefore, the oral hearing required in *Goldberg* is here unnecessary. However, the line of precedent following the *Goldberg* decision does not support the Secretary's position.

It is axiomatic that the requisites of due process vary according to specific factual contexts. *Goldberg*,

supra at 262-63. And it is true that of significant importance in determining the formality and procedural requisites of the process due in particular circumstances is the relative weight of the property interest involved. *Board of Regents* v. *Roth*, *supra* at 570; *Crow* v. *California Dept. of Human Resources Develop.*, 490 F.2d 580 (9th Cir. 1973), *vacated* 95 S.Ct. 1110. That is not to say, however, that the relative weight of the interest involved is dispositive of the question whether an oral hearing is to be afforded in the first place. In its most recent pronouncements concerning the subject, it has become quite clear that the Supreme Court envisions due process to generally require a pre-deprivation hearing of some type as long as the interest at stake is not *de minimis*, irrespective of the severity of the impact resulting from that deprivation. *Goss* v. *Lopez*, *supra*; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes* v. *Shevin*, *supra* at 88-89; *Bell* v. *Burson*, 402 U.S. 535 (1971).[13]

The government does not contend, nor can it be said, that the interest of these plaintiffs in receiving their monthly social security benefits is *de minimis*. As a threshold determination, therefore, it is our opinion that, excluding for the moment consideration of any competing interests on the part of the government, a hearing of some sort should be afforded plaintiffs prior to the recoupment of their social secur-

[13] We share the Third Circuit's view that Judge Friendly's contrary holding in *Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975), is distinguishable and should not be followed.

ity old-age and disability benefits. Of similar resolve were the courts in *Mattern* v. *Weinberger*, *supra*; *Eldridge* v. *Weinberger*, 493 F.2d 1230 (4th Cir. 1974), *aff'g* 361 F. Supp. 520 (W.D. Va. 1973), *cert. granted*, 43 U.S.L.W. 3383 (January 14, 1975); *Williams* v. *Weinberger*, 494 F.2d 1191 (5th Cir. 1974), *aff'g* 360 F. Supp. 1349 (N.D. Ga. 1973).

As previously noted, due process is a flexible concept, and fashioning the specific parameters of the hearing required thereunder depends on striking an appropriate accommodation of the competing interests involved. *Goss*, *supra* at 579. The Secretary suggests that affirmance of the district courts' holdings that due process requires a full *Goldberg* type hearing prior to recoupment of overpayments made to social security beneficiaries would impose a heavy fiscal burden on the Department of HEW. Since the Department already provides overpaid recipients elaborate post-recoupment procedures, including the opportunity for a *de novo* hearing, it appears that any burden in having to establish a new system, wherein the opportunity for a hearing must be provided before rather than after recoupment, will be minimal. The major fiscal difficulty envisioned by the Secretary is the likelihood that the availability of pre-recoupment hearings will result in the filing of a far greater number of requests for reconsideration or waiver.

During oral argument counsel for the Secretary cited statistics that show that the number of hearings on termination of welfare benefits has increased from 19,000 per year to 68,000 per year since the

decision of the Supreme Court in *Goldberg*. Without further clarification, these statistics are of little value. They do not disclose what change, if any, has taken place in the success rate of welfare beneficiaries who receive a hearing. If the effect of *Goldberg* were to cause the filing of a large number of frivolous requests for hearings by people seeking to delay termination, there might be reason to question the wisdom of *Goldberg*. But if, in fact, the percentage of successful contests has remained constant or declined slightly, then *Goldberg* has resulted in a larger number of correct determinations of the issue of whether welfare benefits should be terminated, and, as such, *Goldberg* has benefited rather than burdened the system.

If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted. But the statistics provided by the Secretary show a high rate of success among those requesting either reconsideration or waiver. "Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself." *Elliott* v. *Weinberger*, 371 F. Supp. at 967. One may reasonably wonder what happened to the frivolous, delay-motivated requests for reconsideration or waiver?

As evidenced by plaintiff Biner's case, the present procedure involves a substantial delay anywhere from four to five months between the time a recipient requests an administrative *de novo* hearing upon his or her claim for waiver or reconsideration and the time the hearing is held and the matter is disposed of. Thus, a decision that hearings must be held prior to recoupment would mean that the government could not collect payments for several months after the initial determination that recoupment was necessary. However, the present system has the evil of denying benefits for an equally long time from beneficiaries who are successful, after a full hearing, in reversing the Secretary's initial determination. Which system is preferable should depend upon the success rate of recipients who take their case to the hearing stage. Relevant statistics indicate this rate to be very high —more than one third of those recipients who avail themselves of the opportunity to have their grievances resolved at the *de novo* hearing succeed in persuading the Administration to reverse its original recoupment decision. *Elliott*, *supra* at 967. Since the success rate is significantly high, the government is being allowed to temporarily recoup payments when it has no claim to them. *See Fusari* v. *Steinberg*, 95 S.Ct. 533 (1975), in which the Supreme Court found "significant" in determining the requisites of due process a 19.4 to 26.1 per cent reversal rate of appealed denials of unemployment compensation benefits. A system which delayed the start of recoupment

pending the outcome of a hearing, the purpose of which is to determine the propriety of that recoupment, would provide a net benefit to society.[14]

As alluded to earlier, the Secretary draws a distinction between reconsideration cases and waiver consideration cases, contending that they raise somewhat different legal issues. Under the present procedures, when a recipient asks that the Secretary's overpayment determination be reconsidered, he is challenging the correctness of the overpayment determination itself. Contrariwise, when a social security beneficiary asks that recoupment be waived, he, in essence, is conceding that he was overpaid, but asks that recovery of the excess benefits involved be foregone.

The Secretary contends that in the vast majority of recoupment cases issues are presented which are

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[14] In *Fusari* v. *Steinberg*, *supra*, the Court discussed the manner in which the delay in payment of unemployment insurance benefits pending a hearing affected the balancing required to determine the requirements of due process.

> In this context, the possible length of wrongful deprivation of unemployment benefits [between 100 and 126 days] is an important factor in assessing the impact of official action on the private interests. [citations omitted.] Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process. 95 S.Ct. at 540.

Fusari appears to require that the existence of a substantial delay between the initial administrative determination and the conclusion of a full hearing be weighed as a factor tilting the scales toward providing a pre-recoupment hearing.

uniquely suited to resolution by written submissions and documentary proof, thus obviating the need to provide full-blown, *Goldberg* type hearings. Although we agree that in those cases where factual disputes are as well suited to disposition by documentary proof and written submissions as by oral hearings, due process does not require a pre-recoupment oral hearing, we cannot divine, as does the Secretary, that in virtually all reconsideration and waiver cases the only issues raised are those adaptable to such facile resolution. The Third Circuit's analysis of those cases arising in the recoupment context in which such documentary disposition is permissible under due process principles is extremely well reasoned and warrants quotation here.

> Implicit in *Goldberg* v. *Kelly* is the recognition of the fact that issues likely to arise in welfare termination cases can only be resolved through an oral hearing. One of the plaintiffs was a woman whose benefits had been terminated because she allegedly failed to cooperate with welfare officials in suing her estranged husband. Another was a man whose benefits were terminated because he refused to accept drug counseling and rehabilitation, though he claimed that he did not in fact use drugs. *Goldberg*, *supra* at 256 n.2. It is obvious that resolution of those factual disputes could only be made at an oral hearing, where the trier of fact could evaluate the credibility of the claimant. As the Court noted, "where credibility and veracity are at issue, as they must in many

termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269.

Similarly, in *Goss* v. *Lopez*, *supra*, the question of whether a student had engaged in disruptive conduct justifying suspension could not possibly be determined without an oral hearing. See also *Bell* v. *Burson*, *supra*, which required an oral hearing to determine fault before revocation of a driver's license. By contrast, the Supreme Court in *Mitchell* held that no prior opportunity whatsoever need be given the debtor to oppose repossession of his property, in part because "the issue turns on the existence of the debt, the lien, and the delinquency," which "are ordinarily uncomplicated matters that lend themselves to documentary proof." *Id.* at 609. Thus, "[t]he nature of the issues at stake minimize the risk" of an erroneous *ex parte* determination. *Id.* at 609-10 *Mattern*, *supra* at 23-24.

* * * *

We agree with the Secretary that "reconsideration" cases are generally well suited to resolution by documentary proof, and that claimants in most cases of this type are not constitutionally entitled to a prior oral hearing.[28]

> 28. We decline to establish a flat rule that *all* "reconsideration" cases may be decided prior to recoupment without oral hearing, since we do not have sufficient basis for knowing all the types of cases which the Secretary may classify as being of the "reconsideration" type. The crucial distinction is not whether the cases are labeled

"reconsideration" or "waiver," but whether they lend themselves to resolution by documentary proof. Thus, while we shall use those terms as suggested by the Secretary for purposes of convenience, we do not mean to imply that the constitutionality of recoupment in a particular case is dependent upon the label used nor that we necessarily accept the Secretary's categorization *in toto*.

[As exemplified by the cases at bar] most of these disputes involve matters of a purely arithmetical nature—whether the computation of an earnings statement is correct; whether a computer's calculation of the amount of benefits received is accurate; whether two benefit checks have been received rather than one. In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant. Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right to a *post*-recoupment oral hearing, satisfy due process.

We had one *caveat*, however. Because we cannot envision all the situations in which "reconsideration" cases are likely to arise, we acknowledge the possibility that there may be cases where the opportunity to appear in person might be important in making an accurate determination. Thus, while many "reconsideration" cases can be decided without a prior oral hearing, we believe that, as a matter of due process, the

Secretary should establish procedures which would provide for an oral hearing where a case does not hinge on documentary evidence and where a claimant raises issues which necessitate an evaluation of his credibility. We are mindful of the concern expressed in *Goldberg* that many claimants lack the education or ability to frame written submissions in a persuasive light, and thus if a claimant in a "reconsideration" case *raises* such an issue, he should be entitled to a hearing.

If, however, a claimant merely denies receiving duplicate checks or claims that his earnings were of a certain amount, cancelled checks bearing his endorsement or earnings records maintained by the social security office would seem to constitute hard proof incapable of oral rebuttal. *Mattern, supra* at 24-25.

If plaintiff Biner had simply denied receiving the checks here in dispute or had claimed that they did not represent an overpayment, she would not have been constitutionally entitled to a hearing prior to recoupment. Cancelled checks bearing her endorsement would have been persuasive proof that she had received and negotiated them, and a comparison of the salary listed in her earnings report with the statutory maximum—showing the former to exceed the latter—would be strong evidence that the checks represented an overpayment. "Furthermore, [plaintiff Biner] came forth with no written evidence to support a contention that she had not in fact been paid [$2,216.20] or that the check[s] did not repre-

sent an overpayment." *Id.* at 25-26. In her two requests for reconsideration, she simply stated that "I do not believe there was any overpayment." *Buffington* Tr. 112, 113.

> Consequently, if she had made solely those contentions, it is hard to see how a pre-recoupment oral hearing would be helpful. In all cases, however, a claimant should be informed, prior to initiation of recoupment, of the basis on which an adverse determination is made and should be offered the opportunity to explain or rebut any written evidence against her.[15]
>
> * * * *
>
> The Secretary also contends that "waiver" cases, like "reconsideration" cases, lend themselves to resolution by documentary proof. We disagree. One of the factors to be considered in a "waiver" case is whether the claimant is "without fault," and the Supreme Court has clearly indicated that determinations as to fault must be made at an oral hearing. *Mattern, supra* at 26-27.

As in *Mattern*, the "facts of [plaintiff Biner's case] graphically illustrate the need for an oral hearing." *Id.* While conceding that it may have been at fault in issuing Mrs. Biner the checks which represented

[15] Like the district court in *Elliott* we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of "processing error." *Elliott* Tr. 285. The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

overpayments for the year of 1972, the Administration nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. *Buffington* Tr. 212-13. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. "Similarly, a finding of fault could not rest on the ambiguous [letter included with the first overpayment check sent to Biner] at least without giving [her] an opportunity to explain in person what she thought it meant." *Id.* at 27.

> Another requirement that a claimant in waiver case must meet is that recoupment would either frustrate the purposes of the Act or be against equity and good conscience. As defined by the Secretary's regulations, these terms refer to such matters as difficulty in meeting necessary living expenses or a change of position by the recipient. [20 C.F.R. §§ 404.508, 404.509] We do not see how a resolution of such questions can reliably be determined in the absence of oral testimony.
>
> While we believe that claimants in "waiver" cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a "waiver" case raises no disputed issue of fact,

or where, accepting his version of the facts as true, we could say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would be of benefit. Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation. *See Mills* v. *Richardson*, 464 F.2d 995 1001 (2d Cir. 1972). *Id.* at 27-28.

* * * *

In sum, we conclude that the recoupment procedure established by the Secretary is constitutionally deficient in that it does not provide for pre-recoupment oral hearings in the situations we have indicated are necessary. We do not believe that due process requires pre-recoupment oral hearings in all cases, but the Secretary's existing procedure makes no distinction between the various types of cases and issues that are likely to arise. To the extent that a hearing is required, we agree with the district court[s] that the full panoply of procedural safeguards need not be provided and that the pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial. *Id.* at 28-29.

We are therefore of the opinion that to the extent indicated below the specific requirements outlined in the lower court's opinions are those which are compelled by the Due Process Clause of the fifth amendment. Specifically, the Secretary is required to provide a pre-recoupment hearing in the situations noted previously which affords the complainant the following rights:

1. to present his case orally and to submit evidence with witnesses or documents;

2. to cross-examine witnesses against him;

3. to be represented by counsel if he wishes or to retain the informal assistance of a friend;

4. to have an independent hearing officer preside during the hearing who is totally uninvolved with the initial overpayment and recoupment decisions;

5. to receive an opinion written by the hearing officer which sets forth his decision and the reasons and evidence in support of it;

6. to review his file five days before the hearing;

7. to receive adequate notice at least thirty days prior to the commencement of recoupment: (1) explaining the reasons recoupment is sought; (2) apprising him that in the event he, in writing, requests reconsideration or waiver of the Secretary's initial overpayment and recoupment determination, the Administration will subsequently inform him of the form of review to which he is entitled pursuant to the opinion herein rendered; and (3) informing him that recoupment will not begin until his request has been finally disposed of by way of the required review procedure.[16]

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[16] The court in *Elliott* found the Secretary's form of notice deficient insofar as it failed to apprise recipients of the appropriate forms which must be completed in order to invoke the Administration's review procedures. To remedy the situation, the court ordered the Secretary to specify in his initial overpayment notice those forms the recipient must re-

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The judgments of the district courts are affirmed in part and reversed in part, and the cases are remanded for the entry of new judgments consistent with this opinion.

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quest from the local office to perfect his appeal rights. Although any written submission will trigger commencement of the Administration's reconsideration and/or waiver procedures, given the writing capabilities of many of these old-age and disabled beneficiaries and the subleties which may inhere in determining whether an oral hearing is required in any given situation, it would be prudent of the Secretary to furnish recipients information as to the forms involved in cases of this sort and encourage their utilization. We do not hold that providing information as to such forms is a matter of constitutional imperative, however.

It is to be noted that any recipient who fails to notify the local office of his desire to have his overpayment and recoupment determination reviewed within the thirty day period will be deemed to have waived his right to seek that review by way of written submissions or by way of an oral hearing.

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-3118

DC# 734-73C2

FANNIE BUFFINGTON and FRANCES BINER, Individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES,

v.

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause

be, and hereby is AFFIRMED IN PART AND REVERSED IN PART, AND REMANDED.

A TRUE COPY
ATTEST:

[February 19, 1976]

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

[SEAL]

Filed and entered October 1, 1975

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1611

DC# 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES,

v.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; etc., et al.,
DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED IN PART AND RE-

VERSED IN PART, AND REMANDED TO THE DISTRICT COURT.

A TRUE COPY
ATTEST:

[February 19, 1976]

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

[SEAL]

Filed and entered October 1, 1975

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under 42 U.S.C. § 404(a) and (b),[1] the Secretary of the Social Security Administration (hereinafter

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[1] § 404. Overpayments and underpayments

(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

[Footnote continued on page 51a]

the "Administration") may effect or waive recoupment of overpayments made to social security recipients. The Administration has promulgated procedures and regulations governing recoupment and

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[1] [Continued]

(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(1) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

waiver in its *Claims Manual* § 5503[2] and in the

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[2] The CLAIMS MANUAL § 5503(a) provides that standard form letters sent to recipients subject to recoupment contain:

(1) The incorrect payment made and how and when it occurred.
(2) The right to request reconsideration of the overpayment determination.
(3) The required recovery.
(4) The proposed adjustment or the demand for repayment where adjustment is not possible.
(5) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).
(6) The availability of partial adjustment or partial refund.
(7) The need to notify the DO [Department Office] promptly if the person feels that the circumstances in the case would justify reconsideration, waiver, partial adjustment, or partial refund.

§ 5503(b) provides:

Delay in Withholding Benefits to Recover Overpayments.

Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred for a longer period when the facts in a given case, including but not limited to time case is being being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

(1) the overpayment is based on an annual report by the beneficiary; or

[Footnote continued on page 53a]

Code of Federal Regulations, 20 C.F.R. §§ 404.901

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[2] [Continued]

(2) the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. . . . In the above two situations immediate adjustment action is taken.

§ 5503(c) provides:

If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. *Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, if the substantive determination is affirmed the Reconsideration Determination will cover both issues* (§ 8737). (Emphasis original).

When development is initiated for reconsideration of the overpayment determination, for waiver, or for partial adjustment, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the initial 30-day deferral period, the DO will . . . advise the reviewing office.

After this case was heard, the Administration reported that by January 1, 1975, overpayments based on beneficiaries' annual reports [§ 5503(b)(1)] will not be an exception to the rule of § 5505(b).

et seq. (1973).[3] The Plaintiffs in this class action claim that these procedures and regulations deny them due process of law under the Fifth Amendment because their benefits are reduced or suspended without adequate notice of the reasons for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment,[4] and without a hearing prior to the recoupment. Defendants contest the Plaintiffs' constitutional and jurisdictional claims.

Facts:

This court has divided the Plaintiff class into two subclasses. Represented by Plaintiffs Silva, Ortiz, and Vaquilar, the first subclass consists of all social security old-age beneficiaries, resident in the State of

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[3] §§ 404.901 *et seq.* of Social Security Administration Regulations No. 4, set forth a four-step administrative review including an initial determination (§ 404.905); a reconsidered determination (§ 404.914); an administrative hearing *de novo* before an independent administrative law judge (§ 404.917); review by the Appeals Council of the Social Security Administration, (§ 404.945). After exhaustion of these administrative remedies, 42 U.S.C. § 405(g) provides for judicial review.

The initial overpayment determination notice must state the basis of the determination and inform the recipient of his right to reconsideration (§ 404.907). The initial determination is final unless a written request for reconsideration is filed (§ 404.908). The reconsideration decision is final unless a hearing is requested in writing (§ 404.914).

[4] Partial adjustment is a recoupment method whereby part of monthly benefits are withheld. It is permitted (not mandated) by 20 C.F.R. § 404.502a if certain conditions are met.

Hawaii, whose exposure to recoupment is based upon their own annual earnings reports.[5] Represented by Plaintiffs Elliot, Gaines, and Yamasaki, the second subclass consists of all social security old-age and disability benefit recipients, resident in the State of Hawaii, whose exposure to recoupment is based upon evidence other than annual earnings reports.[6]

Named Plaintiffs of subclass one all received an Administration form letter indicating that based upon their annual earnings reports for the preceding year, a specified overpayment had occurred and that their subsequent benefit payments would be reduced or totally suspended over a specified period. There was some notice of the right to reconsideration and waiver.[7] Plaintiffs believed themselves to be not liable

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[5] Recipients of old age retirement benefits are required to file annual earnings reports; and under 42 U.S.C. § 403(b) and (f), their monthly benefits may be reduced if their reported annual earnings are in excess of specified levels. Disability recipients are not required to file annual earnings reports.

[6] The exposure of Plaintiffs Elliott and Gaines to recoupment is based upon the Administration's discovery of its own alleged error. Plaintiff Yamasaki's exposure is based upon information supplied to the Administration by the insurance carrier of her unemployment compensation insurance.

[7] The pertinent parts of the form letter are as follows:

> "If you believe that this determination is not correct, you may request that your case be reexamined. If you want the reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office.
>
> If additional evidence is available, you should submit it with your request.
>
> To recover the overpayment, we shall withhold your benefits beginning with the check you would normally receive in ————. The next check that you will receive after the full overpayment has been withheld will be for $——. It will be sent to you about ————. Thereafter, your regular monthly benefits of $—— will be resumed.
>
> Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:
>
> 1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*
> 2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.
>
> To decide whether repayment would cause you financial hardship, we shall need a statement of your assets, and monthly income, and expenses. If you think you meet both conditions, call, write, or visit any social security office within 30 days from the receipt of this letter. Please take this letter with you if you visit the office. Unless we hear from you within 30 days, we shall withhold benefits as indicated above."

for any overpayment, not at fault in causing the overpayment, and unable to repay the amount due; they personally contacted local Social Security Administration offices within thirty days of receipt of the form letter. At that time, none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to initiate administrative action, and none actually filed the re-

quisite forms within thirty days.[8] Currently, the Administration has completed recoupment against two of these Plaintiffs while deferring recoupment against the other pending the disposition of this case. Plaintiffs of subclass one have done all that reasonably could be expected of them to exhaust their administrative remedies.[9]

Named Plaintiffs of subclass two received overpayment notices more than thirty days before recoupment was to begin. The notice to Plaintiff Elliott set forth that the overpayment determination was based

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[8] One Plaintiff (Vaquilar) did immediately ask for and receive a partial adjustment of the amount to be withheld monthly. Moreover, acting on advice of counsel, he completed and filed the requisite forms requesting waiver and reconsideration more than thirty days after receipt of the overpayment notice. However, trial testimony indicates that timely completion of the forms would not have changed the Administration's disposition of the first subclass cases.

[9] The general rule is that a litigant must exhaust his administrative remedies, if such remedies exist, before invoking federal jurisdiction. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). However, the exhaustion requirement is excused if a) the administrative remedy is wholly inadequate, and the federal question is plain, or b) exhaustion would cause irreparable harm, as by prejudicial delay. *See* Martinez v. Richardson, 472 F.2d 1121, 1125 (10th Cir. 1973) and authorities cited therein. *See also* Note, *Federal Jurisdiction Over Challenges To State Welfare Programs*, 72 COL. L. REV. 1404, 1438-40 (1972). In this case, exhaustion of administrative remedies is excused on either of the above grounds. The federal question is clear; obtaining administrative relief on the due process issues raised would be a lengthy process during which many of the aged and disabled Plaintiffs in both subclasses would suffer and some would die.

upon her receipt of both retirement and disability benefits when she was entitled to only disability benefits.[10] The notice to Plaintiff Gaines indicated that "duplicate payments" over specified dates was the reason for the overpayment finding.[11] The notice to Plaintiff Yamasaki specified "a processing error" as the cause of the overpayment.[12] All three named Plaintiffs received some notice of the right to reconsideration and waiver.[13] The Plaintiffs believed themselves to be not liable for any overpayment, not at fault in causing the overpayment, and unable to repay the amount claimed; they contacted local Administration offices within thirty days after receipt of the overpayment notice. At that time, none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to instigate administrative action, and none actually filed the requisite forms within thirty days.[14] Presently, recoupment against Elliott and Gaines has been deferred pending a final disposition of this case,

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[10] Affidavit of Bernard Popick, para. 12.

[11] Plaintiff's Exhibit, P-15.

[12] Affidavit of Nancy Yamasaki, Exhibit A.

[13] The pertinent parts of the initial notice were virtually the same as those reprinted in note 7, *supra*.

[14] The three subclass two Plaintiffs, acting upon advice of counsel, eventually did complete and file the requisite forms after the initial thirty days had elapsed. Trial testimony indicates, however, that timely completion of the forms would not have altered the Plaintiffs' current status. *See also* note 9, *supra*.

while recoupment against Plaintiff Yamasaki has been completed. Plaintiffs of subclass two have done all that reasonably could be expected of them to exhaust their administrative remedies.

In summary, the Administration's regulations and procedures, and the Plaintiffs' histories in this case, show that recipients in both subclasses subject to recoupment receive recoupment notices which set out the basic reason for the recoupment, the possibility of reconsideration, the conditions for waiver, and the need to consult the local Administration office within thirty days if they wish to complain. For subclass one Plaintiffs, (at least until January, 1975), recoupment begins immediately after the initial overpayment decision is made. For subclass two Plaintiffs, the notice is sent thirty days before actual recoupment begins. In practice, actual adjustment may at the discretion of the Payment Center be extended beyond 30 days when more time is needed to consider and process the matter. After the first determination is made, if reconsideration or waiver is requested, recoupment is further deferred until those issues are determined on the basis of any documentary evidence submitted. Finally, a post-recoupment hearing is possible should the claimant wish to seek additional review.[15]

The initial overpayment and recoupment notice sent to beneficiaries does not set forth the forms

[15] *See* 42 U.S.C. § 405(b) (1969), and 20 C.F.R. § 404.917 (1973).

needed for reconsideration and waiver, or information about how to complete them. The information and forms missing in the initial notice are not generally made available when the claimant consults his local Administration office. When reconsideration or waiver consideration is requested, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence on an issue which he may understand only nebulously. Many of these claimants are elderly and disabled people whose capacities may frustrate an effective documentary presentation of their case. No oral hearing is given prior to the beginning of recoupment, and any deferral of recoupment beyond 30 days after the date of the initial notice lies completely within the discretion of the Administration. Should a claimant convince the Administration to reverse itself *ex parte* on the overpayment issue, a reduced or suspended payment may ensue with a refund coming a month or more later.

Statistics provided by the Defendant[16] in this case indicate the following:

(a) In 1970 there were overpayments in approximately 1,250,000 cases.

(b) Of these 1,250,000 overpayments, there were requests for reconsideration in approximately 12,000 cases.

[16] Affidavit of Bernard Popick, Director of the Bureau of Disability Insurance of the Social Security Administration, Department of Health, Education, and Welfare, para. 36.

(c) Of the 12,000 reconsideration determinations with respect to overpayments, there were approximately 8,250 reversals and approximately 3,750 affirmances.

(d) Of the 3,750 reconsideration affirmances with respect to overpayments, there were requests for hearing in approximately 1,600 cases.

(e) Of the 1,600 cases that went to hearing with respect to overpayments, there were reversals in approximately 560 cases and affirmances in 1,040 cases.

Stated another way, these statistics mean:

(a) less than one per cent of the beneficiaries in overpayment status contest the matter.

(b) Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself.

(c) about forty-three per cent of those whose overpayment status is affirmed upon reconsideration seek an oral (post-recoupment) hearing.

(d) of those who get an oral hearing, more than one-third succeed in getting the Administration to reverse itself.

(e) overall, of that small percentage of claimants questioning the overpayment determination, about seventy-three per cent (8,250 + 560 out of 12,000) finally succeed in obtaining relief.

It is quite clear from the above that when the claimant feels he has a strong enough case to question the Administration's initial overpayment determination,

there is a very substantial chance that the Administration will eventually reverse itself. What is saddest and perhaps most important about this fact is that many social security recipients, like the Plaintiffs here, depend upon their full monthly benefit payments for subsistence.[17] Erroneous recoupments often cause the aged and infirm drastic hardship.[18]

Jurisdiction:

The Defendants have moved for dismissal for lack of subject-matter jurisdiction. Plaintiffs assert that federal jurisdiction exists under 28 U.S.C. § 1331(a) (1966), 28 U.S.C. § 1361 (Supp. I, 1972), and 5 U.S.C. § 701 *et seq.* (1967) (hereinafter the "A.P.A."). While § 1361 [19] may have been intended to increase the availability of mandamus jurisdiction beyond that under common law,[20] even under the

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[17] The Administration's own CLAIMS MANUAL § 5000 states, "Most people who get an RSDI check depend upon it for the necessities of life."

[18] For example, Plaintiff Elliott was forced to seek emergency welfare assistance from the State of Hawaii after her social security payment for June 1972 was withheld.

[19] § 1361 states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty to the plaintiff."

[20] Whether § 1361 was supposed to expand mandamus jurisdiction beyond common law rules is an open question. *Compare* Burnett v. Tolson, 474 F.2d 877, 880 n. 5 and n. 6 (4th Cir. 1973) *with* Peoples v. U. S. Dept. of Agriculture, 427 F.2d 561, 565 (D.C. Cir. 1970). *See generally*, 7B J. MOORE, FEDERAL PRACTICE § 1361, at 536 (2d ed. 1973).

traditional rules for mandamus writs, § 1361 applies to this case.[21] At common law, mandamus would issue when three elements coexisted, namely, 1) a clear right in the plaintiff to the relief sought; 2) a clear duty on the part of the defendant to do the act in question;[22] and 3) the lack of another adequate remedy. *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969).

As to the third requirement, the Plaintiffs, if denied federal jurisdiction, may not have an adequate remedy elsewhere, *see Burnett* v. *Tolson*, *supra* note 20, at 82-83. The state courts may not be able to issue the requested injunctive relief, *see State of*

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[21] The court does not decide the 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* issues raised by the Plaintiffs, but notes in passing that support exists for either jurisdictional base. 5 U.S.C. § 706(2) applies to this case, and the A.P.A. has been viewed as a jurisdictional grant independent of other statutes. Bass v. Richardson, 338 F. Supp. 478, 482 (S.D. N.Y. 1971); (for authorities *pro* and *con*) *see generally*, Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973); Mills v. Richardson, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972). Although the amount in controversy requirement may preclude § 1331(a) jurisdiction, some courts have indicated that when the deprivation of constitutional rights is at issue, the jurisdictional amount is automatically satisfied. *Accord*, Spock v. *David*, 469 F.2d 1047 (3d Cir. 1972); Cortright v. Resor, 325 F. Supp. 797, 809 (E.D. N.Y. 1971). *Contra*, Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972). *See generally*, Burnett v. Tolson, *supra* note 20, at 880 n. 4.

[22] This traditional requirement is sometimes stated as a duty plainly and positively ascertained, and free from doubt. Wilber v. U.S. *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1930); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966).

Alabama v. *Rogers*, 187 F.Supp. 848, 852 (M.D. Ala. 1960); R. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L. J. 1385 (1964), and any removal to a federal court from a state court would lie within the defendants' sole discretion. Moreover, the first and second requirements are met when the application of a Supreme Court ruling to the instant case clearly shows the existence of plaintiff's constitutional right and its denial by the defendant. *Mead* v. *Parker*, 464 F.2d 1108 (9th Cir. 1972); *Burnett* v. *Tolson*, *supra* note 20; *Daigle* v. *Warner*, 348 F.Supp. 1074 (D.C. Hawaii 1972), *rev'd* on non-jurisdiction grounds, —— F.2d —— (9th Cir. 1973).[23] While the applicability of the relevant Supreme Court ruling should be beyond doubt in the opinion of the district court judge, it need not be so certain as to preclude a different opinion from another court. For example, in *Daigle*, *supra*, the Chief Judge of this District Court under § 1361 applied *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) to summary courts-martial. The Ninth Circuit later reversed, differing with the Dis-

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[23] In *Mead*, a case wherein the adequacy of a prison library was challenged, the Ninth Circuit held that § 1361 jurisdiction applied because Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970) *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) had established constitutional standards for prison libraries. In *Burnett*, the Fourth Circuit asserted § 1361 jurisdiction in a case wherein the prior refusal to allow pamphlet distribution in a public area on a military base was said to be governed by Flower v. U.S., 407 U.S. 197 (1972) which declared unconstitutional the arrest (under 18 U.S.C. § 1382) of a leafleteer previously barred from a military base.

trict Court's use of *Argersinger* without attacking its assertion of § 1361. In this case, the Plaintiffs rely upon *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (hereinafter "*Goldberg*") to establish the existence of the constitutional right to adequate notice and prior hearings in Administration recoupment cases. One court has already approved § 1361 jurisdiction and the application of *Goldberg* to the termination and recoupment of medicare benefits under Administration regulations similar to those involved in this case. *Martinez* v. *Richardson, supra* note 9. Accordingly, the applicability of *Goldberg* to this case is sufficiently apparent to establish for § 1361 jurisdictional purposes the plaintiff's clear right and the defendant's clear duty.[24]

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[24] In Knuckles v. Weinberger, —— F. Supp. —— (N.D. Cal. (1973), wherein the regulations under § 404 of the Act were challenged on due process grounds, Judge Wollenberg distinguished the *Mead* case, and ruled that § 1361 jurisdiction did not exist because the applicability of *Goldberg* to this type of case was not certain enough to support mandamus jurisdiction. With all due respect to Judge Wollenberg, I disagree that the application of *Goldberg* is unclear, and that *Mead* is distinguishable. The court's awareness in *Mead* that the library in question was more deficient than the one in *Gilmore* does not necessarily reflect an understanding that § 1361 jurisdiction applies only when the constitutional infirmity is absolutely identical to (in kind) and exceeds (in degree) that ruled upon in a Supreme Court case. Rather the awareness of the greater library deficiency in *Mead* may have been directed towards the statement of claim issue in the case: "We have no doubt that, under *Gilmore* v. *Lynch, supra*, and *Johnson* v. *Avery* 1969, 393 U.S. 483, 89 S.Ct. 747, 21 L.E.2d 718, the named petitioners have stated a prima facie case under both theories," *supra*, at 1111. When discussing § 1361 jurisdiction, the *Mead* court stated (without mentioning *Gilmore*) that although § 1343 would not apply, . . . "the wrong done, if any, is just as much a violation of the federal Constitution as if done by a state official," *supra*, at 1111. The court's qualification of the wrong by "if any" suggests that the Plaintiff's right and the Defendant's duty need not be as absolutely certain as Judge Wollenberg would seem to require.

Due Process and Hearings Prior to Recoupment:

Goldberg establishes the principle that when the impact of an erroneous administrative decision upon the individual is so severe as to deprive him of the means by which to live, due process requires that the individual have an opportunity to be heard and to cross-examine witnesses before any adverse decision is effected. Specifically, *Goldberg* held that a hearing had to be afforded the individual before his state welfare benefits were terminated. In reaching its decision, the *Goldberg* Court focused upon three considerations: The impact of an erroneous decision upon the individual, the government's interest in fulfilling the purpose of welfare legislation by protecting against administrative mistakes, and the government's interest in conserving the public fisc and minimizing administrative burdens. The *Goldberg* Court found that "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits," at 264. It also found that important governmental interests were served by ensuring that welfare was given to eligible recipients without interruption. Finally, it found that

the additional burden on the government's administration and fisc did not outweigh the first two considerations in favor of providing a prior hearing.

The application of *Goldberg* to this case is simply inescapable.[25] Since most social security recipients

[25] In Richardson v. Wright, 405 U.S. 208 (1972) (Brennan, Douglas, and Marshall, JJ., dissenting), three Justices dissented to the Court's decision to decline ruling on the application of *Goldberg* to the termination of social security disability benefits. The dissenters also expressed the view that *Goldberg* should be so applied. *Accord,* Note, *Procedural Due Process and the Termination of Social Security Disability Benefits,* 46 S. CAL. L. REV. 1263 (1973). *Goldberg* has also been applied in public housing cases. *See e.g.,* Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1971).

The cases cited by the Defendant are clearly distinguishable. It is true that in Kelly v. Wyman, 294 F.Supp. 893, 901 n. 20 (S.D. N.Y. 1968), *aff'd sub nom. Goldberg,* the court did suggest in *dicta* that its ruling might not apply to the federally administered Old-Age, Survivors, and Disability Insurance Program. However, this was not an issue in the case, and the Supreme Court in *Goldberg* expressed no opinion on the issue. In Torres v. N.Y. State Dep't. of Labor, 333 F.Supp. 341 (S.D. N.Y. 1971), *aff'd,* 405 U.S. 949, *reh. denied* —— U.S. ——, 41 U.S.L.W. 3475 (March 6, 1973), the court ruled that due process did not require a hearing prior to the suspension or termination of unemployment benefits; but in that case, the two named Plaintiffs were afforded a hearing prior to termination of their benefits, and new regulations made the issue moot as to other plaintiffs. Messer v. Finch, 314 F.Supp. 511 (E.D. Ky. 1970) held that social security disability benefits could be suspended without a prior hearing, but that judgment was vacated for mootness, 400 U.S. 987 (1971). Anderson v. Finch, 322 F.Supp. 195 (N.D. Ohio 1971) refused to apply *Goldberg* to social security benefits. The Sixth Circuit remanded

depend upon their full benefits for the necessities of life,[26] the adverse impact of an erroneous suspension or reduction upon them is great.[27] Starvation

for reconsideration in light of *Goldberg.* 454 F.2d 596 (6th Cir. 1972).

Recently, when the recipient of unemployment compensation was given an informal personal interview prior to the termination of benefits and the record reflected the absence of a factual dispute or the misapplication of rules and regulations, the Ninth Circuit reversed the lower court and held that a full evidentiary hearing prior to benefit termination as in *Goldberg* was not required. Crow v. Cal. Dep't. of Human Resources Dev., No. 71-1045 (9th Cir., Dec. 14, 1973). The court distinguished *Goldberg* on the grounds that "grievous loss" was not involved in terminations of unemployment compensation. Crow is clearly inapplicable to the case at hand: The Plaintiffs received no prior informal hearing and this court has found that recipients of social security benefits are likely to suffer "grievous loss" when benefits are erroneously terminated.

[26] *See* note 17, *supra.*

[27] The Supreme Court has found an adverse impact sufficient to impose a prior hearing requirement in circumstances far less dire than when necessities of life are concerned, namely, when a deprivation of property was involved. Though a hearing was afforded only three days after the repossession of goods (*i.e.,* a stove and stereo), the Court held that due process was violated because there was no hearing prior to the repossession. Fuentes v. Shevin, 407 U.S. 67 (1972). Similarly, when a state revoked the license of uninsured motorists involved in accidents and the only prior hearing given did not consider the motorist's possible fault, the Court ruled, ". . . before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." Bell v. Burson, 402 U.S. 535, 542 (1971).

may be slower if benefits are reduced or suspended rather than terminated as in *Goldberg*,[28] but some recipients will suffer nonetheless. As the *Goldberg* Court noted, the government has an interest in welfare as a guard "against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," at 265. So is the Social Security Act ". . . designed for the protection of society, and enacted to alleviate the burdens which rest on large numbers of the population because of the insecurities of modern life, particularly those accompanying old age, unemployment, and disability, . . ." *Sayers* v. *Gardner*, 380 F.2d 940, 942 (6th Cir. 1967).[29] As with welfare, the same governmental interests that counsel the provision of social security benefits, counsel as well its uninterrupted provision to those eligible to receive it, and pre-recoupment hearings are indispensable to that end. *See Goldberg*, at 265. Finally, *Goldberg* suggests that the government's objection to pre-recoupment

[28] It has been suggested that *Goldberg* may be distinguishable from other cases because it involved terminations of benefits, not reductions. *See* Wheeler v. Montgomery, 397 U.S. 280, 284-85 (1970) (Chief Justice Burger dissenting); Daniel v. Goliday, 398 U.S. 73 (1970). However, at least one court has intimated that reductions in grants as recoupment for past advances would be covered by *Goldberg*. Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972), *cert.* to 2d Cir. *granted sub nom.* Hagans v. Lavine, —— U.S. ——, 37 L. Ed.2d 396 (1973).

[29] *See also* Note, *Procedural Due Process and The Termination of Social Security Disability Benefits*, *supra* note 25.

hearings on administrative and fiscal burden grounds cannot outweigh the arguments in favor of such hearings.[30] This seems especially true in this case: The Administration's own statistics indicate that only a small percentage of overpayment cases will need to be contested beyond the "paper" hearing stage.[31] Pre-recoupment hearings may also reduce the number of post-recoupment hearings necessary.[32]

There are other compelling reasons why the mandate of *Goldberg* must be applied to social security cases. At the heart of the right to due process lies

[30] ". . . fiscal considerations are always relevant, but seldom if ever decisive in cases of this sort." Crow v. Cal. Dep't. of Human Resources, 325 F. Supp. 1314, 1317 (N.D. Cal. 1970) (termination of unemployment compensation without a prior hearing), *cert. denied* 408 U.S. 924 (1972), *rev'd* on other grounds, —— F.2d —— (9th Cir. 1973).

[31] *See* text accompanying note 16, *supra*. While the court finds that a prior oral hearing is constitutionally necessary when requested, the Administration may still use its current "paper" hearing wherein documents filed by the claimant are reviewed to select out those cases which may be reversed without a hearing. The Administration has claimed that the increased cost of continuing benefits until a hearing is had could be $35 million. However, this figure makes two dubious assumptions, namely that everyone subject to recoupment will request a hearing, and that all will take two years to complete the appeals process. The first assumption is questionable in light of current statistics on recipients who contest overpayment determination. *See* text accompanying note 16, *supra*. The second "two year" assumption assumes that the current time for the full appeals process could not be shortened somewhat by the Administration itself.

[32] *Compare*, Richardson v. Wright, *supra* note 25, at 223 (dissenting opinion).

the recognition of the need for a fair determination of issues and the hope of minimizing mistakes. In this case, the chance of administrative error is great.[33] In *Kelly* v. *Wyman, supra* note 25, the district court was impressed by the fact that post-termination hearings resulted in administrative reversals 36% of the time; in this case, reversals at the post-recoupment hearing stage occur more than one-third of the time.[34] Furthermore, the procedural safeguards which *Goldberg* found constitutionally insufficient for lack of a prior hearing were more stringent than those of the Administration.[35] It is thus not surprising that one court has approved the application of *Goldberg* to procedures similar to those here at issue. *See Martinez* v. *Richardson, supra* note 9. *But see Mills* v. *Richardson, supra note* 21, at 1001 (*dicta*).

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[33] *See* text accompanying note 16, *supra*. These figures of course should not be taken to impugn the competence of the Administration; rather, they attest to its fairness and the complexity of making initial overpayment determinations.

[34] *See* text accompanying note 16, *supra*.

[35] Under the procedure challenged in *Goldberg*, a welfare termination decision was made only after the recipient discussed the case with a caseworker, (a safeguard not present in this case). A unit supervisor then reviewed the caseworker's termination decision. If the supervisor concurred, the recipient was given seven days to request another review by a higher official. Like the Plaintiffs here, the welfare recipient could submit a written statement supporting his case to this higher official. If the higher official felt termination was unwarranted, welfare aid stopped immediately. The welfare recipient, like the Plaintiffs here, could then request a post-termination hearing.

Attempts to distinguish *Goldberg* on the ground that fact issues are not present in recoupment cases, or on the ground that the evidence involved is more reliable, are futile. Issues of fact arise in virtually all contested recoupment situations.[36] To predict when an issue of fact will not be present on a case by case basis is impossible. Although the district court in *Kelly* v. *Wyman, supra* note 25, at 905, may have been influenced in its decision by the fact that welfare terminations sometimes were based upon rumors or "tips", the *Goldberg* Court did not base its decision on the possibility that flimsy evidence might underlie a termination decision. However reliable the evidence may be, when the adverse administrative determination depends upon the resolution of factual issues and the application of legal rules to

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[36] The *Goldberg* Court apparently limited its holding to situations where issues of fact are present, at 268 n. 15. However, subsequent cases suggest that hearings are required by due process even if no issues of fact are present. In Yee-Litt v. Richardson, 353 F. Supp. 996 (N.D. Cal. 1973), *aff'd* —— U.S. ——, 93 S.Ct. 2753, 37 L.Ed.2d 152 (1973) the plaintiffs challenged on due process grounds a California regulation which authorized the termination of welfare aid whenever a Chief Referee determined that only issues of policy and no issues of fact or judgement were present. Judge Carter held that under *Goldberg* this regulation violated due process "because of the inherent difficulties in using this fact policy distinction," at 999. Similarly, in Mother's & Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972), the Court held that even when welfare benefit terminations were based upon pure questions of law, reasonable opportunity for argument had to be given, although a full evidentiary hearing was not necessary.

the facts found that is enough to invoke due process hearing requirements.[37]

Therefore, the court finds that the Administration's recoupment regulations and procedures here challenged violate the Plaintiff's right to due process of law, and orders that henceforth when requested [38] the Plaintiffs of both subclasses be given an oral hearing prior to recoupment.[39] At the hearing, the correctness of the overpayment determination and the recipient's statutory right to waiver under 42 U.S.C. § 404(b) (1969) must be examined. However, since under 20 C.F.R. § 404.502(c) (1973), partial adjustment is not a mandate, but lies within the un-

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[37] *See* Richardson v. Wright, *supra* note 25, at 216 (dissenting opinion).

[38] The Plaintiffs due process right to a hearing may of course be waived by them. It is for the Administration to decide whether obtaining written waivers of the right to a hearing in all, some, or no cases is advisable, but the court notes in passing that written waivers would minimize litigation over whether a recipient knowingly and intelligently decided not to request a hearing.

[39] At first blush the need for a prior hearing in annual report cases (subclass one) may be doubtful because the reports are filed by the claimants themselves and overpayments are determined by the mechanical application of a statutory earnings standard. However, this is but another way of saying that annual report cases involve "more reliable" evidence than others. Even if this supposed reliability were a factor, nothing makes a report more unreliable than when its own author says it is a mistake. In fact, it may be that because overpayments based on annual reports present relatively straight forward fact issues, the claimant will seek an oral hearing only when a mistake is clear.

fettered discretion of the Administration even when the requisite conditions are met, a hearing need not be given on the partial adjustment issue.[40]

The pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial, but it must allow the claimant to present his case orally, to submit evidence with witnesses or documents, and to cross-examine witnesses against him. Representation by legal counsel or other persons is neither required nor prohibited. The hearing officer should

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[40] The Plaintiffs have no due process right to a hearing on partial adjustment because they have no protected property interest in it. In Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), when a university did not rehire a teacher and was under no contractural, statutory, administrative or other obligation to decide the rehiring issue according to any procedure or standard, but could exercise its unfettered discretion, the Court held that the teacher had no constitutional right under the Fourteenth Amendment to a statement of reasons and a hearing on the university's decision not to rehire him. The Court indicated that a right to procedural due process exists only when a protected interest of liberty or property is involved. As to a protected property interest, the Court stated, "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it," at 577. There is no interest of liberty at stake in a partial adjustment determination; and even if a claimant meets the conditions for partial adjustment, he has no "legitimate claim of entitlement to it" since the Administration in its discretion can still rule against him.

Furthermore, since no due process right covers the partial adjustment problem, this court cannot say that partial adjustment or the form needed to file for it, must as a constitutional matter be mentioned in the initial overpayment notice.

not have participated in making the determination under review; he should base his decision solely on the legal rules and evidence adduced at the hearing; he should state the reasons for his decision and the evidence relied upon. *Goldberg*, at 266-71.

Due Process and Notice:

Since a constitutional right can be waived only knowingly, the Plaintiffs must be notified of their due process right to request and receive a pre-recoupment hearing on the overpayment and waiver issues. Notice of that right must be stated plainly and obstrusively in the initial overpayment letter. Furthermore, the initial notice must describe the claimant's right at any hearing to be represented by a lawyer or other person, present evidence, present witnesses in his behalf, cross-examine adverse witnesses, be afforded a fair and impartial hearing examiner, examine all documents prior to and during the hearing, and be given a prompt decision by the decisionmaker.

Due process also requires timely, adequate, and detailed notice of the reasons for an initial overpayment determination. *Goldberg*, at 267. In *Goldberg*, the Court found, "New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with

recipients," at 268. Since the Administration's current procedures do not include a caseworker interview, the social security recipient may not be as fully apprised of the legal and factual bases for the overpayment finding as the welfare recipient was in *Goldberg*.

In annual report overpayment cases involving subclass one Plaintiffs, the recipients are presumed to be familiar with their own reports and the reasons for filing them. The reverse side of the current initial notice explains basically how withheld amounts are determined, and the notice's invitation to consult local Administration offices when questions arise is a necessary and added protection. Subclass two Plaintiffs present a more difficult notice problem. The myriad circumstances and diverse information which may underlie an overpayment determination make it impossible for this court to define what is and is not adequate notice for all subclass two cases. To indicate (as the reason for the overpayment decision) a "duplicate payment" over specified periods may be enough notice for the claimant, but a stated reason such as "processing error" may not be.[41] However, it is reasonable to assume that subclass two Plaintiffs, and subclass one Plaintiffs, who doubt the overpayment, will consult their local Administration office for clarification.

However, in light of the foregoing, the Administration's initial notice does not complete its duty to

[41] *See* text accompanying notes 11-12, *supra*.

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inform the subclass one and two Plaintiffs about the reasons for an overpayment determination. Those Plaintiffs who consult their local Administration office to contest or inquire about the alleged overpayment must receive any additional information which the Administration has.[42] The Administration must inform the Plaintiffs requesting a hearing about all the pertinent details, laws, and regulations supporting the Administration's case far enough in advance to afford the claimant sufficient time to prepare for the hearing.[43]

Finally, while the Administration's current notice adequately informs the recipient of the possibility of reconsideration and waiver, it does not indicate what requisite forms must be completed. The record indicates that even those recipients seeking aid at a local office are not provided with information about or copies of the reconsideration and waiver forms. These deficiencies must be remedied. Claimants fail-

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[42] Normally when an administrative agency is about to take action adverse to a citizen, due process requires that the citizen be informed of the evidence upon which the agency relies so that he can rebut that evidence effectively. *See* Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971); Escalera v. N. Y. City Housing Authority, 425 F.2d 853, 862 (2d Cir. 1970); *cert. denied,* 400 U.S. 853 (1970).

[43] While the text for procedural due process is one of fundamental fairness in the light of the total circumstances, due process always requires that a reasonable opportunity be given the individual to prepare for and meet the case against him. *See e.g.,* Whitfield v. Simpson, 312 F.Supp. 889, 894 (E.D. Ill. 1970).

ing to file the required forms may lose their case for failure to comply with administrative procedures. Therefore, the initial overpayment notice should specify the reconsideration and waiver forms which must be requested from the local office. The local office also has the duty to inform inquiring claimants about the requisite forms, to provide them with those forms if requested, and to assist in their completion. Accordingly:

Judgment may be entered providing that Defendant Weinberger, his successor, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall be restrained and enjoined from reducing, terminating, or suspending social security old age and disability benefits accruing to Plaintiffs and their class without affording them an opportunity for a hearing before any reduction, termination, or suspension is effectuated;

That Defendant Weinberger, his successors, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall restore any and all money withheld since June 22, 1972, without a prior hearing, from Plaintiffs NANCY YAMASAKI, ISABELLE ORTIZ, JOHN V. VAQUILAR, RAYMOND GAINES, and JORDAN S. SILV pending the holding of a pre-adjustment hearing in each of their individual cases;

That the Defendants shall submit to this court, for its approval, a copy of the proposed notice to be

given to the members of the class informing them of the judgment herein, and a copy of the revised rules, regulations, and procedures which they will adopt to conform with the dictates of the judgment herein; and

That this court will retain jurisdiction over this case to order any further action it may deem appropriate and just in light of the decision herein.

The foregoing constitutes the Findings of Fact and Conclusions of Law required by Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: Honolulu, Hawaii, February 4, 1974.

/s/ Samuel P. King
United States District Judge

APPENDIX G

I. Pertinent Provisions of the Social Security Claims Manual

5500. Overpayments Defined

"Overpayment" means payment of any sum in excess of the amount to which the person was entitled or a payment where nothing was due. When a benefit check is cashed by means of forgery, it is technically not an overpayment of title II funds. In such cases section 204 of the Act will not apply with respect to either recovery or waiver of recovery or adjustment of the incorrect payment. The recovery of such amounts is the responsibility of the Treasury Department. However, if the SSA incorrectly certifies the address of someone other than the intended payee and the recipient who has the same or similar name as the beneficiary cashes the check, the negotiation is not considered to be a forgery. Under such conditions recovery or waiver rests with SSA (See § 5521).

Liability for repayment of an overpayment must be determined in all cases. Where benefits are paid directly to a beneficiary, liability falls on the overpaid beneficiary. Where a representative payee receives the

payment, or when the LS has been paid to a funeral home, guides for determining liability are set out in §§ 5511–5512. Where the overpaid person dies before recovery is made, see § 5530 for liability of decedent's estate.

A benefit paid on the basis of an erroneous report by the Deparment of Defense of the death of an individual in the line of duty while he is a member of the uniformed forces on active duty will be considered a correct payment for months prior to the month the SSA is notified that the individual is alive. (See § 5524.5)

The failure to deduct the premium obligation of an enrollee under Part B of title XVIII from his monthly benefit due to an error by the reviewing office of which they should reasonably have been aware is considered an overpayment subject to recovery or waiver under section 204 of the Act. (See § 10470.)

An overpayment also occurs when a payment of past due benefits is made to an individual and such payment has not been reduced by the amount of the attorney's fee payable directly to an attorney under section 206 of the Act. (See § 3526).

5501. Obligations of SSA When Overpayments Occur

Where an overpayment has been made, the SSA is required by sec. 204(a) of the Act to recoup such amounts by:

(*a*) Withholding benefits otherwise due the overpaid person on any E/R, or due other persons entitled to payments on the same E/R on which the overpayment was made; or

(*b*) Requesting the overpaid person or his estate to refund the amount in excess of the correct payment; or

(*c*) Any combination of (*a*) and (*b*).

However, if the person from whom recoupment is sought is not at fault and adjustment or recovery would cause financial hardship, or be inequitable, relief from repayment can be granted in accordance with sec. 204(b) of the Act, the waiver provision of the law.

Under the above provisions of the law, we must, on the one hand, safeguard the trust funds and attempt to make them whole by recovering benefits incorrectly paid. On the other hand, we must recognize the rights of beneficiaries to waiver of recovery or their need for relief by partial adjustment, when the facts justify such action.

5501.2 When to Limit Recovery Efforts—Tolerance Rule

(*a*) *General*

In pursuing collection of debts, there is a point of diminishing returns beyond which further collection efforts are not justified. For example, do not undertake costly efforts to recover debts involving insignificant amounts. Also, do not prolong recovery efforts if it is evident that the overpaid person does not have the financial means to repay.

Although no recoupment action will be taken where the tolerance rule applies, accept any voluntary refund by the beneficiary.

(*b*) *Tolerance Rule*

1. Overpayment $15.00 or less—if immediate adjustment is available, recover any overpayment which does not exceed $15.00, and notify the person of the action taken.

Immediate adjustment is available only if benefits for prior months (i.e., an underpayment) is due the person primarily liable for repayment and/or a lump-sum death payment is payable. Because of the advance notice of adjustment requirement, adjustment is not immediately available if benefits are payable for only the current and future months or if benefits are not currently due.

If immediate adjustment is not available, do not send a notice of overpayment. In such case there will be no attempt to recover the overpayment.

2. Overpayment $15.01 or Larger—If the overpayment exceeds $15.00, recovery will be attempted from the person primarily liable regardless of the method of recovery (i.e., adjustment or refund). Such overpayments will be processed under the usual rules.

5501.3 Application of Tolerance Rule

(*a*) *General*

The "$15 tolerance for limiting the collection of debts stated in § 5501.2 are applied to those overpayment cases processed manually. When overpayments are computer processed, letters requesting refund and proposing adjustment are generated even though the amount of the overpayment is $15 or less. Programing changes still have to be made to fully effectuate application of the tolerance.

In any case, where a beneficiary offers to refund the amount of the overpayment, accept it regardless of the amount (see § 5501.2).

(*b*) *District Office Procedures*

If a beneficiary contacts a district office about a request for refund or proposed adjustment processed by the computer where the amount of the overpayment is $15 or less, and raises a question about the correctness of the overpayment determination or about the recovery action, obtain form SSA–795 or an RC, and forward to the reviewing office. Take no additional development with respect to the overpayment determination or waiver. If adjustment has been proposed in such a situation, see §§ 5503.6–5503.65 concerning use of the SSA–2521 and/or SSA–3079.

(*c*) *Reviewing Office Procedures*

Upon receipt of information either from the DO or direct from a beneficiary where the beneficiary either fails to make refund of an overpayment of $15 or less processed by the computer or protests the adjustment action in such case, file the material in the claims folder. Advise the beneficiary that it will not be necessary for him to repay this amount, and, if adjustment has been proposed, see § 5503.6(b).

5502. How Overpayments Are Handled—General Definitions

(*a*) *Recovery*

This is a term that is often used to refer to all methods of obtaining the money that was overpaid.

These methods are:

(*1*) *adjustment*

If benefits are payable to the overpaid person on any E/R, or to other persons entitled to payments on the same E/R on which the overpayment was made, these benefits may be withheld and the overpayment may thus be *adjusted* (§§ 5513–5520.2).

(*2*) *refund*

If adjustment is not available, the money may be recovered by obtaining a *refund* from the overpaid person. (§§ 5525–5530.5).

(*3*) *civil suit*

Under certain conditions, cases may be referred to GAO for recovery from the overpaid person. (§§ 5531–5535).

(*b*) *Waiver*

Under certain conditions, it is possible to grant relief from repayment. In such cases, we talk in terms of *waiving* recovery, or adjustment of the overpayment. (For purposes of waiver, overpayments are classified as either entitlement or deduction overpayments). Detailed procedures on *waiver* of recovery or adjustment are stated in §§ 5540–5586.

(*c*) *Fraud Involved*

Where a violation of one of the criminal provisions of the act in connection with a claim is suspected and an overpayment exists, all appropriate postadjudicative and recovery actions must be taken to the U.S. Attorney or OPO, BRSI, Program Compliance Branch in accordance with §§ 7543 ff. Thus, action to recover an overpayment will be taken as described above and in the succeeding sections notwithstanding fraud involvement.

SUMMARY OF PROCEDURES FOR DEALING WITH OVERPAYMENTS

5503. Written Notice

When it is determined that an overpayment has been made, the person liable for repayment should be notified in writing (see § 5508.5 for sample letters). The notice will inform the person of:

(a) The incorrect payment made and how and when it occurred (i.e., the overpaid amount, the monthy amount, if any, which should have been paid, why the lesser amount was due the months for which the lesser amount should have been paid, and the amount which was paid for those months). If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the WE, and basis for entitlement of the new beneficiary. (see § 4571 (a)).

(b) The right to request reconsideration of the overpayment determination.

(c) The required recovery.

(d) The proposed adjustment or the demand for overpayment determination.

(e) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).

(f) The availability of partial adjustment or partial refund.

(g) The need to notify the DO promptly if the

person feels that the circumstances in the case would justify reconsideraiton, waiver, partial adjustment, or partial refund.

It may be necessary to modify the overpayment notice in certain instances. For example, where an overpayment for a prior year cannot be fully recovered by adjustment until some month past the current year, include a request for refund of the entire overpayment when notifying the person of the overpayment and of the proposed adjustments. Advise the person that, if refund is received, payment of benefits can by resumed for an earlier month. Also, when recovery from a person outside the U.S. is involved, see § 5529.

5503.1 Delay in Withholding Benefits to Recover Overpayments

Before adjusting an overpayment against current benefits due a beneficiary, he (and, if applicable, his payee) will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice will specify the month and year the adjustment is scheduled to begin; the date of the proposed adjustment must be at least 30 days later than the date of the overpayment notice. Actual adjustment may, at the discretion of the reviewing office, be deferred for a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary.

The only exception to this rule is when the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. Under such circumstances the surviving beneficiary is given notice at the time of superendorsement of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right.

In the above situation, an immediate adjustment action is taken.

5503.2 Person Liable Protests

(*a*) *General*

The action to be taken when a person from whom recovery is sought responds to an initial notice of overpayment depends on how and when the person responds, the reason for the response, and the method of recovery involved.

In response to an inital overpayment notice, the person may telephone, visit, or write to a DO or RSDI Reviewing office. Generally, the person contacts the DO where appropriate action is taken. In some cases, the reviewing office is contacted directly and a request for DO assistance usually needed to resolve the matter with the person.

The person may question the fact that he has been overpaid, the amount of the overpayment, or both. He may agree with the overpayment determination but dispute the need for recovery, or, although questioning neither the overpayment determination nor repayment of the overpaid amount, he may question

the means or rate of recovery or wish to make full refund instead of having his benefit adjusted. Or, because he does not fully understand the overpayment notice, he may not be in a position to exercise his rights relating to the overpayment and its recovery.

When feasible, the response to an overpayment notice should be handled by means of personal contact. Personal contact gives the employee an opportunity to make inquiry on pertinent issues, give explanation as appropriate, and observe the reactions of the overpaid person for evaluation purposes.

The extent of the development and the amount of corroborating evidence needed will be governed by what is reasonably necessary considering the relative importance of the recommended action and whether questions arise from conflicting statements and all the circumstances in the case. For example, less corroborating evidence would be acceptable in establishing the financial condition of the person overpaid where partial adjustment is the issue, rather than waiver of recovery of an overpayment. For waiver determinations, corroborating evidence may be required to validate a claim by the person overpaid that withholding his monthly benefit would cause hardship. In appropriate situations, obtain corroborating evidence to establish whether the person overpaid is without fault in causing the overpayments and whether recovery would be against equity and good conscience. Only in those cases however, where a request for reconsideration of the overpayment determination or for waiver or partial adjustment is made, or the response indicates that such relief may apply, should development along these lines be undertaken.

(b) DO Action

The action necessary by the DO in handling a response to an overpayment notice usually includes one or more of the following:

(1) Explanation of the overpayment, including use of the SSA–2339 (Request for Postentitlement Information) when the available information (including that available by a query of the ROAR record) does not permit a satisfactory response (§§ 9705 ff.).

(2) Completion of an SSA–561 (Request for Reconsideration) and submission of any additional evidence pertinent to appeal when the person disagrees with an overpayment determination (§§ 5503.4 and 7102–7135).

(3) Waiver development, including completion of an SSA–632 (Overpayment Recovery Questionnaire) or equivalent information, as well as resolution, if necessary, of the liability issue when the person protects recovery of overpayment or is appealing the overpayment determination (§§ 5503.5, 5510–5512 and 5540–5572).

(4) Completion of an SSA–1395 (Receipt and Transmittal Form) when refund is made and, if the person wants to repay in installments and adjustment is not available, completion of an SSA–633 (Agreement to Refund Overpayment) (§§ 5525–5525.9 and 9750 ff.).

(5) Establishment of a person's financial situation, usually involving completion of Part IV of an SSA–632, in connection with a request for partial adjustment (§§ 5503.55, 5515–5515.8).

(6) Completion of SSA–2521 (Request for Priority Action--Overpayment) when any of the preced-

ing apply *and* (A) recovery of the overpayment by adjustment has been proposed or is taking place and (B) there is no ROAR control of the overpayment (§§ 5503.6 and 5503.62).

(7) Completion of SSA–3079 (ROAR Input Data) when there is a ROAR record *and* (A) refund is the method of recovery and either (1), (2), or (3) apply *or* (B) adjustment has been proposed and any of the preceding apply (§ 5525.6).

Procedural due process requires that there be no recovery pending opportunity for the person to appeal the overpayment determination or show that the conditions for waiver are met. It is particularly important that benefits otherwise due not be interrupted to adjust an overpayment until the person has been afforded time to exercise his rights concerning the overpayment.

DO completion of the SSA–2521 and SSA–3079 insures that benefits are not withheld to recover an overpayment or that followup refund requests are not made until the person's reponse to an initial notice of overpayment has been resolved in accordance with the following sections.

5503.3 Request for Explanation of Overpayment

(*a*) *General*

Despite the explanation of the overpayment (i.e., how and when it occurred) and appeal and waiver rights in the initial notice of overpayment, the person may not understand why he was overpaid or how we arrived at the amount of overpayment, or the person may need additional information to decide on any further course of action (e.g., whether or how best

to appeal the overpayment determination or request that recovery be waived). Until this explanation is provided and the person has an opportunity to exercise his rights in connection with the overpayment, there should be no further recovery efforts.

(*b*) *DO Procedures*

When the information available in the DO (including that available by a query of the ROAR record) does not permit a satisfactory explanation of the overpayment, use an SSA–2339 to request additional information from the reviewing office (§§ 9705 ff.). Prepare and input SSA–3079 data (i.e., using Type of Action code "E"—§ 5525.6) if there is a ROAR record of the overpayment (§ 5525.5). Annotate the SSA–2339 "ROAR Input (Date)". If adjustment has been proposed or is taking place *and* no ROAR record exists, attach an SSA–2521 (§ 5503.62) as the transmittal document for the SSA–2339.

After providing the additional explanation of the overpayment, ascertain if the person wishes to request reconsideration or waiver.

1. Person Does Not Request Reconsideration or Waiver—If the person decides not to appeal the overpayment determination or request waiver, obtain a statement to this effect from the person whenever an SSA–2521 or SSA–3079 was prepared in connection with an SSA–2339 request or when the reviewing office in accordance with (c) below asked for DO assistance in providing the explanation. Forward the statement including any refund (other than a benefit check), SSA–1395, SSA–633, or request for partial adjustment to the reviewing office. If there is a ROAR record of the overpayment and partial adjust-

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ment is requested, proceed as in § 5503.55, including update of ROAR (using Type of Action code "B"—§ 5525.6) before forwarding the partial adjustment request to the reviewing office.

2. Person Requests Reconsideration or Waiver—If the person wishes to appeal or requests that recovery be waived, proceed as in §§ 5503.4 or 5503.5, including update of ROAR (using Type of Action code "R," "W," or "C"—§ 5525.6).

(*c*) *Reviewing Office Procedure*

When the reviewing office receives a direct request for additional information or is unable to determine what action the person is requesting, forward the request with an explanation of the overpayment and a payment worksheet to the DO and ask that the DO contact the person. If a ROAR record of the overpayment exists, input the request for explanation to ROAR to prevent further recovery efforts (e.g., adjustment of benefits, reminder notice, etc.), and advise the DO of the action taken. If no ROAR record exists and adjustment has been proposed or is taking place, stop the adjustment, and advise the DO of the action taken.

5503.4 Request for Reconsideration of Overpayment

(*a*) *DO Procedures*

When a person requests reconsideration of an overpayment determination, have him complete form SSA–561 and submit any additional information pertinent to the appeal (§§ 7102–7135). Be certain, however, that the person wants to appeal the substantive determination (i.e., fact and/or amount) of overpayment before obtaining a completed SSA–561. Do not have the person complete an SSA–561 if he is seeking only an explanation of the overpayment or is interested in requesting only waiver of recovery.

Note that a reconsideration request must be in writing.

When an SSA–561 is completed, insure that the specific reasons for requesting reconsideration of the overpayment determination are shown. In some cases, it will be necessary to obtain copies of negotiated checks (§§ 5705, 5819.5(b), 5822), for purposes of reconsidering an overpayment determination. Do not request the folder from the reviewing office in connection with a reconsideration request unless the person appealing asks that it be available for his review.

In addition, undertake full waiver development, including the completion of form SSA–632, and submission of any other information pertinent to a waiver determination (§§ 5540 ff.) unless (1) it is obvious that reconsideration will result in a determination that there is no overpayment or (2) the person does not want to pursue waiver. Explain to the person that, even if reconsideration affirms the overpayment determination, relief from repayment can be granted if the conditions for waiver are met and his failure to furnish the waiver information will generally result in a denial of waiver being included in the reconsideration notice. If the person refuses to provide the waiver information, secure a statement from him to this effect on the SSA–561 or on an SSA–795 or document this fact on an RC.

Immediately prepare and input an SSA–3079 using Type of Action code "R" (or "C", if both reconsidera-

tion and waiver are requested), if there is a ROAR record of the overpayment (§§ 5525.5–5525.6). Annotate the SSA–561 (or top-most document) "ROAR Input (Date)". If no ROAR record exists, immediately notify the reviewing office by using form SSA–2521 (§ 5503.62) to stop a proposed adjustment action because of the request for reconsideration unless the reviewing office has already been notified of the need for such action (e.g., in accordance with § 5503.3). However, do not delay the SSA–3079 or SSA–2521 merely because the reconsideration and waiver development require additional time.

Handle any request for withdrawal of the reconsideration request in accordance with § 7126.7. If the person in such case wishes to pursue waiver, follow the instructions in § 5503.5.

(b) Reviewing Office Procedures

Acknowledge in writing a timely reconsideration request when the person makes direct contact with the reviewing office, and take action to stop any further recovery actions, including the reinstatement of benefits (§ 5503.6(b)). The reviewing office also takes action to stop recovery action when notified of a timely reconsideration request by form SSA–2521 unless the DO has timely input SSA–3079 data in accordance with (a) above. Follow the instructions in §§ 7102 ff. and 8700 ff, for reconsidering the determination.

NOTE: If a person in appealing an overpayment determination contests the amount of overpayment, it may be necessary to secure copies of negotiated social security checks (§§ 5705, 5819.5(b), 5822) for purposes of the reconsideration determination. For example a

person alleges not having been paid for 2 months in which the overpayment notice stated that he had received monthly checks of $324 each.

Where an SSA–561 is received and it is clear that the person is not contesting the overpayment but is instead requesting relief from repayment (e.g. the only reason on the SSA–561 for requesting reconsideration is "The overpayment was not my fault, and I do not believe I should have to pay back the overpayment," and form SSA–632 is the only attachment), do not reconsider the overpayment determination. In the notice of the waiver determination, include the following:

> "Although you requested reconsideration of the overpayment determination, the reason you gave indicates that you are not questioning the fact or amount of overpayment but only the need for recovery. Although we have considered your reasons for asking that we waive recovery, we have not formally reviewed the overpayment determination. If we were wrong in not reconsidering the overpayment determination, please contact any social security office within 30 days of the date of this notice."

When the reconsideration determination has been made, make certain that the ROAR record is updated (§ 5525.6).

5503.5 DO Handling of Request for Waiver of Recovery

If the person requests waiver of recovery whether or not appealing the overpayment determination, have him complete an SSA–632 (§§ 5545–5545.5).

If a ROAR record exists (§§ 5525.5), prepare and input an SSA–3079 using Type of Action code "W"

(or "C", if both reconsideration and waiver are requested). The ROAR record will be updated by the reviewing office when the waiver determination is made.

If adjustment has been proposed or is in effect *and* no ROAR record exists, complete an SSA–2521, and send it to the reviewing office.

5503.55 DO Handling of Request or Different Rate of Repayment

A person who disagrees with neither the overpayment determination nor the need for recovery may request a different rate of repayment. Where full withholding has been proposed or is in effect, the person may request that only a part of his benefit be withheld each month until the overpayment has been fully adjusted (§§ 5515–5515.8), and, where refund is the method of recovery, the person may request refund in installments rather than immediate refund in a single payment (§§ 5525.4–5525.45).

Where a requested rate of repayment would permit full recovery within a 36 month period and is no less than $10 a month, there is no need to develop. If overpayment recovery would not be completed within 36 months, obtain financial information by having the person complete Parts III and IV of the SSA–632. If the rate of repayment based on the person's financial situation would be less than $10, develop waiver by having the person complete the SSA–632. For a discussion of partial adjustment, see §§ 5515–5516; see §§ 5525.4–5525.45 for a discusion of installment refund and use af the SSA–633.

If a person does not take issue with the overpayment determination or the need for recovery, do not

have the person complete an SSA–561 and do not develop for waiver unless the suggested rate of repayment would be less than $10. When a person against whom adjustment has been proposed or whose benefit is being withheld to recover an overpayment requests a lesser rate of adjustment, prepare and input an SSA–3079 (i.e., using Type of Action code "B") if there is a ROAR record of the overpayment (§§ 5525.53, 5525.54). Annotate the request (e.g., SSA–795) "ROAR Input (Date)." If adjustment has been proposed and no ROAR record exists, notify the reviewing office by using form SSA–2521 (§ 5503.6); if any necessary development will not be delayed, use the SSA–2521 to transmit the request.

5503.6 Use of SSA–2521

(a) DO Procedures

When a ROAR record of the overpayment does not exist *and* adjustment is the method of recovery, use the SSA–2521 (§ 5503.62) to notify the reviewing office of the following:

(1) Request for explanation of overpayment (§ 5503.3),

(2) Request for reconsideration of the overpayment determination (§ 5503.4),

(3) Request for waiver of recovery (§ 5503.5),

(4) Request for partial adjustment (§ 5503.55),

(5) Refund of an overpayment, and

(6) Request for reconsideration of a denial of waiver (§§ T5507, T5511)

When there is a ROAR record of the overpayment or adjustment is not the method of recovery, do not use the SSA–2521. Also, once payment continuation is assured do not use the SSA–2521.

To make proper use of the SSA–2521, the DO should be aware of the individual's payment status. Generally, the payment status will be clear from the information provided by the person and from the overpayment notice. The "Current" payment block (i.e., adjustment has been scheduled) or "Deferred" payment block (i.e., overpayment adjustment action has been taken) on the SSA–2521 should usually be checked. The "Unknown" block should seldom be checked.

If a request for overpayment reconsideration or waiver of recovery is received from an individual in suspension or deduction status and additional information is received showing that the benefits are otherwise payable, use an RC to alert the reviewing office of the request for reconsideration or waiver at the same time you input the posteligibility data to reinstate.

If reconsideration or waiver of recovery is requested and the SSA–2521 is being used, forms SSA–561 and/or SSA–632, or their equivalent, should be completed and sent to the reviewing office. If possible, full reconsideration and/or waiver development should accompany the SSA–2521. However, if unable to send the completed form(s) and development, check "Pending," and estimate when the necessary development will be sent.

Similarly, if partial adjustment is requested and the SSA–2521 is being used, the request and any information as required by §§ 5515 ff. should accompany the SSA–2521 to the reviewing office unless the development needed will be delayed (§ 5503.55). Explain to the person that the reviewing office will advise him when there has been a decision concerning his request for partial adjustment.

(b) Reviewing Office Procedures

If within 30 days of receiving the initial notice, the person requests reconsideration of the overpayment determination or waiver of recovery, or good cause is established for not making such request within 30 days, take action to stop the scheduled adjustment action and to restore all benefits withheld to recover the overpayment (§ T5505).

If the waiver request is made after 30 days, or if the reconsideration request is made after 30 days but prior to the expiration of reconsideration rights (i.e., within 60 days), and good cause for late filing cannot be established, any adjustment action in progress will be suspended and benefits reinstated effective with the date of the reconsideration or waiver request (§§ T5502(c) and T5505.7).

If good cause for late filing is established, any request is treated as though timely filed. If good cause is being developed, immediately reinstate effective with the date of request. After development, reissue back payments if good cause is established (§ T5505.7).

5513. Adjustment of Overpayments

Recoupment of an overpayment of title II benefits by adjustment is accomplished under sec. 204(a) of the Act by withholding benefits otherwise due the overpaid person on any E/R, or from other persons entitled to payments on the same E/R on which the overpayment was made (§ 5510(c)). See § 5513.2 for the order of priority of adjustment.

Where a representative payee is solely or jointly liable for repayment of an overpayment to a beneficiary (§ 5511) and fails to make refund, adjustment may be made against any benefits payable to the representative payee in his own right.

For the priority of adjusting overpayments when deduction and other withholding provisions are involved, see § 5430.

* * * * *

5513.3 Proposed Rate of Adjustment

When adjustment is the method of recovery, a withholding of the full monthly benefit (after any SMI premium deduction) will be proposed.

If, in response to a proposed withholding of the full monthly benefit, the beneficiary indicates that the amount to be withheld will cause financial hardship or otherwise protests recovery (§§ 5503.3 ff.), the rate of adjustment to recover an overpayment

not subject to waiver may be varied when the facts and circumstances in a given case dictate a different course (§§ 5515 ff.).

* * * * *

PARTIAL ADJUSTMENT

5515. Reasons for Partial Adjustment

When a beneficiary currently eligible for payment of title II benefits is liable for repayment of an overpayment, the initial notice of overpayment (§ 5503) will propose recovery of the overpayment by a withholding of the full amount of the benefit payable. Full withholding is generally not required, however, if a written or oral request for waiver or partial adjustment is received.

Partial adjustment to recover an overpayment serves three basic purposes:

(*a*) If the beneficiary is dependent upon some of his monthly benefits for ordinary and necessary living expenses, withholding only part of his benefit each month eases his financial situation to some extent by permitting the beneficiary to rely upon a part of the benefit for his current basic needs during the recovery period.

(*b*) If waiver depends upon whether adjustment would defeat the purpose of title II (§§ 5550–5551), withholding only part of a monthly benefit frequently enables us to effect full recovery of the overpayment without depriving the beneficiary of funds needed for ordinary and necessary living expenses.

* * * * *

Sections 5515.2–5516 explain the policies and procedures to be applied in granting partial adjustment

when relief from repayment is requested or premium collection is involved.

5515.2 When To Grant Partial Adjustment

(a) *Partial Adjustment Permitted*

Grant a request for partial adjustment, unless (1) the beneficiary has income and resources sufficient to meet current ordinary expenses despite a loss of the full monthly benefits or (2) there is evidence of fraud.

When an overpaid beneficiary does not take issue with the overpayment determination or the proposed adjustment and clearly requests only that adjustment be effected by withholding part of his monthly benefit do not have the beneficiary complete an SSA–561 or develop for waiver unless a withholding of less than $10 a month would result. Conversely, treat a request for waiver of recovery of an overpayment as a request for partial adjustment if waiver must be denied. Note that, if waiver depends upon a finding of defeat the purpose of title II and the beneficiary does not have the incorrect funds in his possession (§ 5546) and needs only part of his monthly benefit for ordinary and necessary living expenses (§§ 5550–5551), waiver should be denied and partial adjustment granted. However, if it would be necessary to withhold less than $10 a month to preclude a finding of defeat the purpose, approve waiver rather than great partial adjustment if the person is without fault. Of course, if the person is at fault in causing the overpayment, waiver cannot be approved and partial adjustment should be granted in accordance with § 5515.4(c).

(b) *Partial Adjustment Not Permitted*

Regardless of a beneficiary's alleged financial circumstances, never permit partial adjustment to recoup an overpayment which was the result of fraud (i.e., an intentional false statement or representation by the person against whose benefits adjustment is being made, or by his willful concealment of or deliberate failure to furnish material information). In such situation, full withholding of the benefit to adjust the overpayment is required. Also, see § 5502(c).

5515.4 Establishing Rate of Partial Adjustment

(a) *General*

If the beneficiary requests partial adjustment or a request for waiver must be denied, the rate of adjustment established will depend on the facts in the particular case. If partial adjustment only is requested, the beneficiary's financial situation generally will not be developed. Whether or not financial information is obtained, a person will not be considered at fault for purposes of partial adjustment unless a finding as to fault has been made in connection with a request for waiver. Where a withholding of less than $10 a month would be warranted by the beneficiary's financial circumstances, a finding as to fault must be made (§ 5515.2(a)).

(b) *When to Develop Financial Circumstances*

Where financial information has not been obtained in connection with waiver development, presume that withholding the full amount of the monthly benefit

will cause financial hardship unless (1) there is information to the contrary or (2) full recovery of the overpayment could not be completed by the suggested rate of adjustment within a 36 month period.

When the available financial information appears to warrant a rate of adjustment greater than the suggested rate of adjustment or the partial adjustment would not permit the overpayment to be recovered within 36 months, secure detailed financial information by having the beneficiary complete Parts III and IV of the SSA–632, and establish the rate of adjustment in accordance with (c) below.

(*c*) *Financial Circumstances Not Developed*

Where financial information was not developed in connection with a request for waiver and was not required by (b) above, grant partial adjustment at the rate suggested by the beneficiary. If the beneficiary does not suggest a monthly withholding amount, withhold one-fourth of the monthly benefit (prior to any premium deductions—see § 5516) to recover the overpayment. In figuring 25 percent of a person's benefit, round to the nearest whole dollar amount.

* * * * *

(*d*) *Financial Circumstances Developed*

When a beneficiary's financial circumstances are known (e.g., beneficiary completed Parts III and IV of the SSA–632 in connection with a request for partial adjustment or waiver), withhold that amount by which the beneficiary's income exceeds his expenses except as specified below.

(1)Withhold no less than $10 per month; *and*

(2) Withhold the full monthly benefit (after deduction for any SMI premium) to the extent of any incorrect funds in the beneficiary's possession; *and*

(3) Withhold 25 percent of the monthly benefit (before any deduction for SMI premiums) but no less than $10 monthly if the beneficiary was at fault in causing the overpayment and recovery at a rate less than 25 percent of the monthly benefit would not permit full recovery within 36 months (or before termination of entitlement).

Of course, if the beneficiary requests a greater rate of withholding, adjust at the rate suggested by the beneficiary.

If it would be necessary based on a comparison of income and expenses to withhold less than $10 from a person who is without fault, partial adjustment does not apply (§ 5515.2(a)).

If the comparison of income and expenses would indicate a withholding of less than 25 percent of the monthly benefit of a beneficiary who is a fault, establish the amount by which income exceeds expenses as the rate of adjustment provided full recovery will be completed within 36 months or prior to the beneficiary's expected last month of entitlement. However, where a withholding of less than 25 percent of the benefit would not permit full recovery within 36 months or, if earlier, the beneficiary's expected last month of entitlement, grant partial adjustment of 25 percent of the monthly benefit.

II. Pertinent Provisions of the Code of Federal Regulations, Title 20

20 C.F.R. Part 404 provides in pertinent part:

§ 404.502 Overpayments.

Upon determination that an overpayment has been made, adjustments will be made against monthly benefits and lump sums as follows:

(a) *Individual overpaid is living.* (1) If the individual to whom an overpayment was made is at the time of a determination of such overpayment entitled to a monthly benefit or a lump sum under title II of the Act, or at any time thereafter becomes so entitled, no benefit for any month and no lump sum is payable to such individual, except as provided in paragraphs (c) and (d) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded. Such adjustments will be made against any monthly benefit or lump sum under title II of the Act to which such individual is entitled whether payable on the basis of such individual's earnings or the earnings of another individual.

(2) If any other individual is entitled to benefits for any month on the basis of the same earnings as the overpaid individual, except as adjustment is to be effected pursuant to paragraphs (c) and (d) of this section by withholding a part of the monthly benefit of either the overpaid individual or any other individual entitled to benefits on the basis of the same earnings, no benefit for any month will be paid on such earnings to such other individual until an amount equal to the amount of the overpayment has been withheld or refunded.

* * * * *

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under paragraph (a) and (b) of this section may be effected by withholding a part of the monthly benefit payable to an individual where it is determined that:

(1) Withholding the full amount each month would "defeat the purpose of title II," i.e., deprive the person of income required for ordinary and necessary living expenses (see § 404.-508); and

(2) Recoupment can be effected in an amount of not less than $10 a month and at a rate which would not result in extending the period of adjustment beyond the earlier of the following:

(i) The expected last month of entitlement; or

(ii) Three years after the initiation of the adjustment action (except that in cases where the individual was "without fault" (see §§ 404.507 and 404.510), the period of adjustment may be extended beyond 3 years, if necessary); and

(3) The overpayment was not caused by the individual's intentional false statement or representation, or willful concealment of, or deliberate failure to furnish, material information.

* * * * *

[35 F.R. 5943, Apr. 10, 1970]

§ 404.502a Notice of right to waiver consideration.

Whenever an initial determination is made that more than the correct amount of payment has been made, notice of the provisions of sections 204(b) and 1870(c) of the Act regarding waiver of adjustment or recovery shall be sent to the overpaid individual and to any other individual against whom adjustment or recovery of the overpayment is to be effected (see § 404.506).

[37 F.R. 10554, May 25, 1972]

* * * * *

§ 404.506 When waiver of adjustment or recovery may be applied.

Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under title II (old-age, dependent's, survivor's and disability insurance benefits) or under title XVIII (hospital and supple-

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mentary medical insurance benefits) has been made (including a payment under section 1814(e) of the Act) with respect to an individual:

(a) Who is without fault, and

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title II of the Act, or

(2) Be against equity and good conscience.

[32 F.R. 18026, Dec. 16, 1967]

* * * * *

§ 404.508 Defeat the purpose of Title II.

(a) *General.* "Defeat the purpose of title II," for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) *When adjustment or recovery will defeat the purpose of title II.* Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is

sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

§ 404.509 Against equity and good conscience; defined.

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for the worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 32 F.R. 18026, Dec. 16, 1967]

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§ 404.905 Administrative actions that are initial determinations.

* * * * *

(b) *Modification of the amount of monthly benefits or lump sum.* The Administration shall, under the circumstances hereafter stated in this paragraph, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether:

* * * * *

(4) There has been an overpayment or underpayment of monthly benefits or a lump sum and, if so, the amount thereof, and the adjustment under section

204(a) or section 204(d) of the Act, to be made by increasing or decreasing the monthly benefits or lump sum to which an individual is entitled;

* * * * *

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J, but which may receive administrative review, include, but are not limited to, the following:

* * * * *

(e) The withholding by the Administration in any month, for the purpose of recouping an overpayment, of less than the full amount of the monthly benefit otherwise payable in that month (see § 404.502).

* * * * *

§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910). Where more than the correct amount of payment has been made, see § 404.502a.

[37 F.R. 10554, May 25, 1972]

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the

revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent individual alleging equitable entitlement to a lump sum or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905 (g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Social Security Administration or, in the case of an individual in the Philippines, at the Veterans' Administration or, in Philippines, at the Veterans' Administration Regional Office in the Philippines, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart 0) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the Act, at an office of the Railroad Retirement Board, within 60 days after the date of receipt of notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953. For purposes of this section, the date of receipt of notice of the initial determination shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

[41 FR 47917, Nov. 1, 1976]

§ 404.912 Parties to the reconsideration.

The parties to the reconsideration shall be the person who was the party to the initial determination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ 404.913 Notice of reconsideration.

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in

question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the specific reasons therefor and inform the parties of their right to a hearing (see § 404.917), or, if appropriate, the requirements for use of the expedited appeals process (see § 404.916a).

[40 F.R. 53386, Nov. 18, 1975]

§ 404.916 Effect of a reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956, or unless the expedited appeals process is used, in accordance with § 404.916a.

[40 F.R. 53386, Nov. 18, 1975]

* * * * *

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905 if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Social Security Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 1676, Dec. 31, 1966]

* * * * *

III. Pertinent Statutory Provision

42 U.S.C. 404:

OVERPAYMENTS AND UNDERPAYMENTS

(a) Whenever the Secretary finds that more or less that the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

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